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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-991

OTTER TAIL POWER COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal From The United States District Court
For the District of Minnesota

Brief for Amici Curiae General Public Utilities Corporation Pacific Gas and Electric Company San Diego Gas & Electric Company Virginia Electric and Power Company

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Certain electric utilities,[1] as amici curiae, file this brief out of concern for the impact this case can have upon the electric utility industry in the United States. We disagree with the District Court's judgment as to the rule of law applicable to this case and are apprehensive lest affirmance by this Court make it broadly applicable throughout the industry. This brief seeks to present to this Court certain facts concerning the electric utility industry, in particular the broad and intricate pattern of federal, state and local regulation, that should be of controlling impor-

1. General Public Utilities Corporation, Pacific Gas and Electric Company, San Diego Gas & Electric Company and Virginia Electric and Power Company.

tance to the outcome of this case. The Memorandum that the Solicitor General has filed in this case with respect to this Court's jurisdiction states that "[T]he issues . . . are novel ones that this court has not decided, and they are obviously important in the administration of the Sherman Act and in its relation to the Federal Power Act." We concur. We would add that the issues created for the electric utility industry by the District Court's decision are much more far-reaching than the issues decided, and that the law of this case will inevitably have an important impact on the character of the industry in the immediate future.

This brief is submitted with the consent of both the Appellant and the Appellee.

OPINION BELOW AND RELATED PROCEEDINGS

The opinion of the United States District Court for the District of Minnesota, 331 F.Supp. 54, is contained in the Appendix filed by the Appellant in this case.

The Federal Power Commission has acted with respect to some of the issues addressed by the District Court. *Elbow Lake v. Otter Tail Power Co.*, FPC Dkt. E-7278, Opinion 603, Sept. 13, 1971, *appeal pending* (ordering long-term interconnection); *Elbow Lake v. Otter Tail Power Co.*, 40 FPC 1262 (1968), *aff'd*, 429 F.2d 232 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971) (ordering short-term interconnection).

JURISDICTION

The judgment of the District Court was entered on October 22, 1971, and thereafter amended on November 10, 1971. The Appellant then filed timely notice of appeal and a jurisdictional statement pursuant to Section 2 of the Expediting Act, 15 U.S.C. § 29. The United States, by Memorandum filed in May, 1972, did not oppose the noting of probable jurisdiction in this case. This Court noted probable jurisdiction on May 22, 1972.

SUMMARY OF ARGUMENT

We do not here take the position that the antitrust laws can never be applied to the electric utility industry. Rather, we do contend in this case that the District Court made a fundamental error by ignoring basic characteristics of the electric utility industry. Most important, the District Court took no account of the existence, purpose and effect of the pervasive regulatory scheme that governs virtually every aspect of the industry's operation. Similarly, the District Court overlooked the *reason* for pervasive regulation, particularly the destructiveness of duplicative competition and the long-run tendency of the industry's markets toward "natural monopoly", and the *effect* of regulation on the manner in which monopoly power can be exercised.

A direct result of the District Court's devaluation of regulation is the opinion's application of § 2 of the Sherman Act, 15 U.S.C. § 2, to the electric utility industry exactly as if that industry were totally unregulated. It thus treated monopoly that is sanctioned and in many instances mandated by federal, state and local legislation exactly like monopoly attained in the unregulated sectors of the economy contrary to government policy.

The District Court's decision poses a direct conflict between the public service obligation imposed on electric utilities as an integral part of the scheme of comprehensive governmental regulation and Sherman Act prohibitions against maintaining monopoly power. The anomalous result of thus applying § 2 of the Sherman Act to regulated utilities is that virtually every action by such utilities in carrying out their obligations to serve could be a violation of federal antitrust law. Such a situation is intolerable.

The District Court should have realized that the elaborate pattern of regulation applicable to Otter Tail and the elec-

tric utility industry generally provides consumers, both at retail and wholesale levels, with the kind of protection as to price and conditions of service that is expected from competition in the nonregulated sector of the economy. Indeed, the Federal Power Commission proceedings related to this case, by granting to the municipality of Elbow Lake the privilege of long-term interconnection, demonstrate that the regulatory agency is capable of balancing the statutory requirements of the Federal Power Act against those of the antitrust laws, making it unnecessary for the federal courts to intervene.

It is accordingly imperative that this Court put § 2 of the Sherman Act in proper context by holding that it was never intended to be transferred blindly from the unregulated industry context in which it has been developed to an industry subject to direct and pervasive government regulation of prices and terms and conditions of service.

ARGUMENT

A. The Existence of Comprehensive Regulation Cannot Be Ignored in Applying the Antitrust Laws to the Electric Utility Industry.

The central fact of this case, and any other case dealing with the electric utility industry, is that electric utilities are subject to pervasive regulation at the federal, state and local levels. We shall, here, first review the nature of the complementary schemes of regulation which have been elaborately interwoven through deliberate congressional and state and local legislative decisions, reflecting careful recognition of the particular characteristics of the electric utility industry that make regulated monopoly more socially beneficial than unregulated competition. Then we shall demonstrate that the goals of regulation and competition are similar, with their attainment in the electric

industry dependent on sound regulation rather than blind application of antitrust standards.

(1) THE PERVASIVE NATURE OF REGULATION

(a) Federal Regulation

At the federal level electric utilities are supervised, where pertinent, under the Public Utility Holding Company Act, 15 U.S.C. § 79—79z-6, and the Federal Power Act, 16 U.S.C. § 791a *et seq.* The Securities and Exchange Commission, pursuant to the Public Utility Holding Company Act, regulates holding companies and their subsidiaries' activities. Regulation under this Act is directed at eliminating unsound holding company financial structures, excessively profitable service contracts between operating subsidiaries and their holding companies, and accounting, rate and dividend practices that obstruct state regulation. 15 U.S.C. § 79a.

Part I of the Federal Power Act, 16 U.S.C. §§ 791a-823, an outgrowth of the Federal Water Power Act of 1920, deals with the licensing and certain related aspects of hydroelectric projects. Part II of the Federal Power Act, 16 U.S.C. §§ 824-824(h), regulates electric utility companies engaged in interstate commerce of electric energy. Specifically, it prescribes rate regulation with respect to the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce (16 U.S.C. § 824). In addition, Part II delegates authority to the Federal Power Commission ("FPC") to require interconnection and wholesale service (16 U.S.C. § 824a). Part II also provides for regulation of the disposition of property, mergers, and purchase or issuance of securities. Finally, Part III of the Act, 16 U.S.C. §§ 825-825u, contains numerous procedural and administrative provisions governing licensees under Part I and public utilities under Part II, including extensive requirements for accounting and reporting to the FPC.

In addition, under the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011-2296, the Atomic Energy Commission regulates the construction and operation of nuclear-powered generating stations.

(b) State Regulation

Regulation of electric utilities in most states is detailed and comprehensive.[2] Generally, state regulation covers retail rates; non-discriminatory standards of service; certification of generation and transmission facilities; provisions for initiation and discontinuation of service to customers; designation of service territories; regulation of financial matters including the issuance of securities, consolidations, and mergers; and safety regulation. In most states, public utilities have a statutory obligation to render service to all customers within their service territories[3] and are required to construct facilities sufficiently in advance to provide such service.[4] In addition, such states generally have extensive accounting and reporting requirements. Historically, state regulation is the result of the state legislatures' withdrawal of regulatory authority from local governmental bodies.[5]

(c) Local Regulation

Virtually all electric public utilities are subject to some form of local regulation. Even in states where comprehensive regulation has been taken over by state authorities, the cities and counties usually retain authority to regulate the

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2. *See* Federal Power Commission, *Federal and State Commission Jurisdiction and Regulation, Electric, Gas and Telephone Utilities,* FPC S-184 (1967).

3. *E.g.*, California Public Utilities Code § 451.

4. *E.g.*, California Public Utilities Code § 761.

5. Spurr, *Guiding Principles of Public Service Regulation* (1924), Vol. 1, 1-9.

utilities' use of the localities' streets and byways. This regulation is accomplished through the granting of franchises. In addition, in a few states, rate and other related regulation remains with the cities and counties.

(2) THE SIMILAR GOALS OF REGULATION AND COMPETITION

The decision now being reviewed by this Court was reached by mechanically applying § 2 concepts to Otter Tail. We can only conjecture that the District Court must have believed that the role of the antitrust laws in protecting the public interest would remain unfulfilled by regulation, for otherwise it could not have intended the bizarre results its decision inevitably produces. This Court need have no such concern.

A substantial number of the policy purposes of regulation are either parallel to or identical with those of antitrust. Antitrust seeks to eliminate monopoly profits by enhancing competition and promoting entry into the market. But because competition has been found to be infeasible, regulation restrains entry. At the same time, however, regulators closely supervise utility rates so that electric utilities earn no more than a fair rate of return. The aims of antitrust to eliminate monopoly profits are thus also the aims of regulation.

Antitrust also depends upon competition to promote efficiency. In its limitation of allowable expenses and investments to those found prudent, regulation promotes efficiency in service to the customer. Indeed, federal and state licensing and certification proceedings for major investments promotes efficient allocation of resources by requiring advance economic justification.

Just as antitrust seeks to eliminate unjustified price discrimination, so too does regulation in mandating reasonable and equitable rates to comparable customers.

Finally, where antitrust relies upon competition to provide dissatisfied consumers with the recourse of alternative sources of supply, regulation performs the same function by making available the processes of regulatory agencies for the handling and rectification of consumer complaints.

Thus, there is no necessity to apply § 2 concepts in this case. Regulation performs those functions antitrust normally expects competition to perform. In addition, there is no logic in applying such concepts in this industry. Section 2 of the Sherman Act was enacted to deal with the effects of the breakdown of competition and its replacement with unregulated private control over prices and terms of sale, not to penalize governmentally sanctioned and regulated public utility monoply. Furthermore, in determining where "the public interest" lies, regulators must, as this court has found, give weight to antitrust considerations. *Pan American World Airways, Inc. v. United States,* 371 U.S. 296 (1963); *Federal Communications Commission v. RCA Communications, Inc.,* 346 U.S. 86 (1953). The decision of the District Court, with little basis in logic or necessity, misapplies antitrust law and policy and thereby does violence to the concept of regulated monopoly.

B. The Economic Characteristics of the Industry Bar Application of Traditional Antimonopoly Concepts.

Otter Tail was charged with monopolization and attempted monopolization under § 2 of the Sherman Act by the refusal to sell electric power at wholesale, the refusal to wheel electric power to municipalities, the participation in local electoral campaigns concerning distribution system ownership, and the institution of litigation, all with the purpose and effect of foreclosing competition. In resolving the issues below, the District Court had recourse to concepts developed by the courts over the years in interpreting § 2 in conventional antitrust cases.

These traditional § 2 concepts assume that competition is in the public interest. However, the underlying premise of all regulation of electric utilities is that the utilities possess "technical characteristics leading almost inevitably to monopoly or at least to ineffective forms of competition."[6]

Of these characteristics, two are particularly noteworthy. First, electric utilities inevitably must invest huge quantities of capital in long-lived and inflexible facilities directly connected to consumers. Thus to have direct competition for the patronage of given consumers would require costly facility duplication and therefore impose on society excessive and unnecessary capital costs of a magnitude that generally has been considered unacceptable.

Second, electric utility operations are characterized by the existence of substantial economies of scale—that is, by declining costs as the scale of operation increases. Thus, a single large electric utility occupying a given market area generally can render service at significantly lower cost than could several smaller utilities operating in the same area.

Given these cost characteristics, in the absence of franchises or other regulatory restrictions, one firm would tend naturally to expand by offering lower prices, thus inducing growth in the size and density of the market served and thereby achieving even lower costs. The end result of such an uninhibited process would be a market occupied by only one utility—hence the term "natural monopoly."[7]

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6. Bonbright, *Principles of Public Utility Rates* (1961) 8.

7. This is a widely-recognized phenomenon. As early as 1924 it was noted, "Competition was the earliest form of regulation; but this proved to be bad, in the long run, for the consumers of utility

(Footnote Continued)

Direct competition among electric utilities has long been considered economically wasteful and hence, undesirable. Indeed, in most states competition at the distribution level is prohibited by statute or limited by regulatory policy.[8] Because competition would result in costly, inefficient and unnecessary capital investment, with resulting higher cost to consumers, government has approved geographic monopolies, and imposed on them the previously described pervasive scheme of regulation. The District Court nonetheless applied traditional antitrust concepts without regard to this crucial fact.

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service, as it too often meant duplication of facilities in a field not large or rich enough to support more than one company. The usual outcome of this was consolidation, followed by recoupment, by means of high rates, of losses due to the competition. Whatever may be the value of competition as a regulator of charges in other lines of business, it proved to be a failure in the public utility industry." Spurr, *supra n. 5*, 1. And more recently it has been noted, ". . . [C]ompetition in the public utility industries typically proved ephemeral and ineffective . . . The issuance of competitive franchises was, with discouraging regularity, followed by combination among the franchisees, despite the efforts of legislatures to prevent it. . . . In city after city, as a result, one company would emerge with almost all the franchises issued. The policy of competition, it seems generally conceded, was a failure." Kahn, *The Economics of Regulation: Principles and Institutions*, Vol. 2 (1971) 118 (footnote omitted).

8. The concept of governmentally sanctioned geographical monopoly for electric utilities is not new. Indeed, Massachusetts, the first state to regulate electric utilities, included the following in 1886 as Section 3, of its regulatory act:

> "In any city or town in which a company is engaged in or organized for the purpose of the manufacture and sale of electric light, no other company shall lay or erect wires over or under the streets, lanes and highways of such city or town for the purpose of carrying on its business without the consent of the mayor and aldermen of such city or selectmen of the town after a public hearing and notice to all parties interested." Mass. Acts, c. 382, § 3 (1886).

In fact, the years have not diminished legislative concern for avoiding wasteful duplication of utility facilities. In 1961, New Mexico adopted the following statute:

> "It is the declared policy of the state that the public interest, the interest of the consumers, and the interest of

(Footnote Continued)

Moreover, the District Court's failure to grasp the importance of the natural monopoly characteristics of the electric utility industry prevented it from recognizing that Otter Tail was, as the Federal Power Commission found,[9] "legitimately concerned" about its survival. Because of the peculiar nature of competition in this naturally monopolistic industry, rivalry between private regulated monopoly and public unregulated monopoly with unrestricted access to private bulk power supply facilities, would result first in the loss of portions of Otter Tail's retail market, and,

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investors require the regulation and supervision of such public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates, and to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension, without unnecessary duplication and economic waste, of proper plants and facilities for the rendition of service to the general public and to industry." New Mexico Acts, H.B. 256, § 68-3-1B (1961). See also Wisconsin Acts, c. 432, § 2 (1955).

These public policy considerations have not been confined to privately owned utilities. The policies are reflected in the 1939 Annual Report of the Tennessee Valley Authority at page 49, stating:

> "The position of the Authority with regard to existing facilities and investment was stated by Director Lilienthal, speaking in the spring of 1934 before a convention of bankers in New York city. He said:
>
> > 'To avoid duplication of facilities, to avoid territorial competition, to buy property at fair prices are cardinal policies of the Tennessee Valley Authority. Our adherence to these policies should reassure you of the Authority's determination to respect prudent investment in useful property.'"

As to the interplay between utilities, public and private, this Court observed in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939) at 141, "Whether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy."

9. *Elbow Lake v. Otter Tail Power Co.*, FPC Dkt. E-7278, Opinion 603, September 13, 1971 (Appellant's Appendix H, A-141).

eventually, because of consequent higher rates to remaining customers, seriatim loss of that remaining market.

C. The Public Service Obligation Is Inconsistent with the Traditional Concept of Monopolization.

A company's lawful activities aimed primarily at meeting its obligation to provide service to all who seek it cannot appropriately be condemned—even if the ancillary effect of such activities is to preserve its monopoly position.

In conventional § 2 cases, monopoly is presumed to be bad, even if lawfully achieved. Despite the absence of unreasonable restraints of competition or other anticompetitive practices, a market in which competition has failed is viewed unsympathetically by antitrust law. It follows that efforts to maintain monopoly are generally condemned as violations of § 2 of the Sherman Act. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

But while the antitrust laws proceed from the premise that monopoly is undesirable in the unregulated sector, where monopoly is lawfully achieved and legally sanctioned by legislative and regulatory policy as being in the public interest, lawful activities in preserving that status and in fulfilling a public service obligation cannot appropriately be condemned. In blurring this distinction between undesirable, unregulated monopoly and mandated regulated monopoly, the District Court's analysis ignores the nature of the electric utility industry and the federal, state and local policy under which it operates.

This monopoly status carries with it the concomitant duty to construct such facilities as are required to supply the demands of consumers.[10] Utilities are required to anti-

10. Indeed, many state regulatory commissions currently have been conducting special inquiries in an attempt to make certain that capacity additions planned by electric utilities are adequate to meet anticipated demands.

cipate demand and build to meet that demand. To the extent that such expansion preserves monopoly, it represents fulfillment of an obligation to do so.

Thus the very rationale supporting classic § 2 analysis will be inapplicable in cases involving regulated electric utility monopolies. A close examination of the opinion of the District Court below confirms the irrelevance of traditional antimonopoly concepts in this case.

D. Regulation Eliminates Private Monopoly Power.

The presence of regulation removes from private utilities the objectionable effects of monopoly power which naive examination of market structure might suggest are present, and denies to them the power to create "bottlenecks" to competition.

At the outset the opinion describes monopoly power in classic antitrust terms as the power to fix prices or exclude competition. *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). But the court does not then go on to determine whether in fact Otter Tail possesses such power.

If the evil inherent in a firm's possession of monopoly power is its unchecked ability to raise prices and extort monopoly profits, then it is clear that Otter Tail simply does not possess that kind of power. In fact, it could not legally exact monopoly profits, and the opinion recites no evidence whatsoever that it had sought to do so. In fact, its wholesale rates are thoroughly regulated by the Federal Power Commission, and its retail rates are regulated at the state or local level.

Similarly, the Court below apparently did not examine the question whether in fact Otter Tail had the power to exclude competition. No effort was made to determine whether its market share, the result of natural monopoly

characteristics and government policy, conferred such power to exclude, given the presence of the Federal Power Commission regulation. That regulation includes both the power to order interconnections, and thereby provide access to bulk power supplies, and the power to regulate the wholesale rates at which such power is sold.[11] Under these circumstances, Otter Tail's transmission facilities could not be a "bottleneck" to competition.

CONCLUSION

In the electric utility industry, regulated monopoly has been substituted for competition as a matter of government policy to avoid harmful, duplicative competition, and to ensure reliable, economical, and adequate supply. Regulation imposes upon such monopolies the legal obligation of public service at rates that do not yield monopoly profits.

The District Court below made Otter Tail a violator of the antitrust laws on grounds that make vulnerable every public utility that acts to meet its public service responsibility imposed by federal, state, and local legislation. Such a result could neither have been intended nor anticipated. By ignoring the fact of regulation, which is the single most important fact in the *Otter Tail* case and in the electric

11. *See, e.g., Gainesville Utilities Dept. v. Florida Power Corp.*, 402 U.S. 515 (1971).

utility industry at large, the District Court erred below, and should accordingly be reversed.

Respectfully presented,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-991

OTTER TAIL POWER COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal from the United States District Court for the District of Minnesota

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BRIEF FOR SEVENTEEN INVESTOR-OWNED ELECTRICAL UTILITIES, AMICI CURIAE

This brief on behalf of 17 investor-owned electrical utilities, as amici curiae, is filed with the written consent of both the appellant and the appellee. These 17 investor-owned utilities collectively account for about 22 percent of the electrical generation capacity of the investor-owned utilities in the United States. They are acutely concerned with one aspect of the district court's decision because, if affirmed by this Court, it

would drastically alter the relationship between investor-owned electrical utilities and Government-operated or Government-funded electric power projects in direct conflict with Congressional determinations.

OPINION BELOW

The opinion of the United States District Court for the District of Minnesota, which is reported at 331 F. Supp. 54, is reproduced in the Appendix filed by the appellant in this case.

JURISDICTION

The judgment of the United States District Court for the District of Minnesota was entered on October 22, 1971, and was amended on November 10, 1971. The appellant filed a timely notice of appeal and jurisdictional statement pursuant to Section 2 of the Expediting Act, 15 U.S.C. § 29. This Court noted probable jurisdiction on May 22, 1972.

QUESTION PRESENTED

Appellant, Otter Tail Power Company, seeks review of a district court decision that an investor-owned utility's refusal to sell electrical power at wholesale to municipally-operated electrical distribution systems and its refusal to "wheel" power generated by Government-operated or funded projects to those municipal distribution systems—*i.e.*, to permit power generated by those Government projects to be carried over Otter Tail's system to those municipal systems—coupled with certain other acts, constitutes a monopolization of commerce in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

Virtually all investor-owned utilities would be affected by the requirement of compulsory wheeling of

Government power articulated by the district court. We therefore address only the issue whether an investor-owned utility violates the Sherman Act by refusing to wheel Government power to a local distribution system. More precisely, the question which this case presents for amici is:

> Whether an investor-owned utility may be required under conventional antitrust concepts to wheel Government power in disregard of
>
> (1) the wholly unique economic structure of the electric power industry deriving from substantial Government participation in the means of production of power and the legislatively-created investment, tax, cost, and pricing advantages affecting Government power that make it impossible for the private sector to engage in meaningful competition with even a minimally efficient Government system, and
>
> (2) the repeatedly articulated Congressional directive that the question of an investor-owned utility's wheeling of Government power shall be settled by negotiation.

STATUTES INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, and the applicable sections of Part II of the Federal Power Act, 16 U.S.C. §§ 824-824h, are set forth in the appellant's brief. The pertinent parts of other statutes bearing upon the economic structure of the investor-owned and the Government sectors of the electric power industry are set forth below in the appropriate parts of this brief.

STATEMENT

Following a trial and an exchange of stipulations between Otter Tail and the Government, the district court found that Otter Tail had violated Section 2 of the

Sherman Act by refusing to deal with certain small towns, located in Western Minnesota and the Eastern Dakotas, that had embarked upon a program of establishing and operating their own systems for distributing electricity with the purpose of taking over the retail distribution systems formerly operated by Otter Tail and supplied with power that it generated.

The district court reasoned that Otter Tail enjoyed a "monopolistic position" in its franchise service area in that it served 75.6 percent of the area's towns and controlled most of the area's subtransmission lines—*i.e.*, lines that transmit power from bulk power sources to local distribution systems.[1]

The district court then found on what were essentially undisputed facts that Otter Tail had refused to wholesale its own power or to wheel power produced by the Department of the Interior's Bureau of Reclamation hydroelectric stations or by Government-funded REA cooperatives to the municipal distribution systems that were established to oust Otter Tail. On these facts, coupled with evidence concerning Otter Tail's institution of litigation relating to the legal propriety of certain local elections, the district court concluded that "defendant has a monopoly in the relevant market and has consistently refused to deal" and that such "conduct is prohibited by the Sherman Act." 331 F. Supp. at 61.

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[1] It should be noted that the Record supports appellant's statement that Otter Tail enjoys only 28.9 percent of the electrical retail sales in the relevant geographic market (DX 94, A. 1201-09, 872-76, 912-16), and owns only 8 percent of the electrical transmission lines in that market (DX 91, A. 1196-98, 855-59, 877). The district court's error in focusing upon the number of towns Otter Tail served instead of its share of retail sales highlights its broad-axe approach to the complex economic relationships concerned in this case.

In support of this holding the district court relied principally upon two decisions of this Court, *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927), and *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951). The court also referred to the so-called "bottleneck theory" of antitrust law and concluded that Otter Tail's alleged dominance with respect to subtransmission lines made that theory applicable to condemn its refusal to make those lines available to others by wheeling Bureau or REA cooperative power to the new municipal distribution systems established to oust Otter Tail. In support of that misapplication of the "bottleneck theory" the lower court cited a treatise, Neal, *The Antitrust Laws of the United States* (1960), a decision of this Court, *United States* v. *Terminal Railroad Ass'n*, 227 U.S. 383 (1912), and certain lower court authorities.

Otter Tail urged the inapplicability of these antitrust concepts by pointing out "in defense of privately owned utilities vis-a-vis public power interests" that the imposition of a duty to wheel Government-generated or Government-funded power would inexorably lead Otter Tail's customers to seek the cheaper Government power. Otter Tail pointed out that "most of its customers would convert and the Otter Tail system would be eroded to the detriment of its customers, stockholders, and employees." 331 F.Supp. at 64.

The district court's only response to these arguments based upon the unique mixture of private and Government participation in the electric power industry was to cite *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1966), a case dealing with a conventionally competitive industry. It failed to consider the basic economic factors—principally the capital cost and tax

advantages accruing to Government-generated or Government-funded power—that were wholly absent in *Schwinn* and in all of the other cases cited in support of its decision.

In short, the district court concluded that it could apply *per se* antitrust concepts derived largely from cases concerning normally competitive industries to mandate a practice which will significantly alter the relationship between the Government and private sectors of the electric power industry.

POSITION OF AMICI AND INTRODUCTION TO THEIR ARGUMENT

An investor-owned utility's wheeling of Government power figuratively and literally links the Government and private sectors of the electric power industry. If compulsory wheeling is required, the Government can compel the utilization of the entire system of an investor-owned utility to reach out with electric power that can be cheaply sold, not because of efficiencies but because of low interest and tax policies, to induce customers of that investor-owned utility to become Government power customers. Wheeling is therefore a vital factor in the delicate equilibrium that exists between the Government and private sectors of this unique industry.

Heretofore under Congressional directives the two sectors have generally used voluntary bargaining processes to make appropriate arrangements for the wheeling of each other's power without impairing that equilibrium. But the decision below, if not corrected by this Court, will undo this balanced bargaining relationship by placing a doctrinaire thumb on the Government power side of the scale.

For if in any cognizable antitrust sense Otter Tail is a "monopolist" which must upon demand wheel Government power regardless of the effects upon Otter Tail's business, then most other investor-owned electric utilities could also be denominated "monopolists" and could similarly be compelled by a Federal court order to wheel power for the Government. That requirement would have a drastic and ramifying economic impact on the electric power industry. Inevitably, it would contract the customer market of the private sector of the industry with manifest consequences upon the presently installed and now vital planned future generating capacity of the investor-owned utilities, and ultimately upon the rates which those utilities' customers must pay.

It is our position that the district court erred in relying upon abstract and inapposite antitrust concepts to reach its result in this case. Its decision is an example of aberrant antitrust that disregards both the unique nature of the electric power industry and the policy directives of Congress on wheeling that vitally affect the equilibrium between the Government and investor-owned sectors of that industry.

Antitrust concepts are designed primarily for application to conventionally competitive industries. The private sector of the electric power industry is subject to intensive regulation. It cannot, therefore, be simplistically made to conform to the same antitrust models as the bicycle, photography, and newspaper businesses, which were involved in three of the cases relied upon by the district court. See *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953).

But there is another overriding consideration that distinguishes the electric power industry from all others. It is paramountly the only one in the United States that involves a significant amount of Government participation in the means of production. Economically there is an interface between private power and the vastly advantaged, often unregulated, and preferenced Government power. Government power operates under borrowing and tax advantages which, while not lowering the actual costs for generating power, substantially lower the price at which it can be sold to consumers. Accordingly, there is and can be no ordinary concept of "competition" between the Government and private sectors of the industry. Practices that are concerned with the equilibrium between the two sectors, such as private wheeling of Government power, cannot therefore be judged by the blunderbuss *per se* application of conventional Sherman Act concepts.

Instead of reliance upon antitrust concepts to alter the equilibrium between the Government and private sectors of the power industry, as would immediately result from the *per se* imposition of a duty to wheel Government power, it is essential to examine the public policy decisions that have been made by Congress concerning the interrelation of the two sectors. Since Congress has consistently determined that the investor-owned utilities are not to be compelled to wheel Government power, and Congress has just as consistently refused to impose that requirement, it is clear that the district court's decision flies in the face of controlling Congressional policy.

I

THE POLICY OF THE SHERMAN ACT CANNOT BE USED AS A STANDARD FOR ALTERING THE RELATIONSHIP BETWEEN GOVERNMENT AND PRIVATE POWER.

This Court has often delineated the reach of the Sherman Act and described the policies which it was designed to foster. Mr. Justice Black's opinion for the Court in *Northern Pac. Ry.* v. *United States,* 356 U.S. 1, 4 (1958), is characteristic of many decisions:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

We emphasize at the outset that we are not claiming here these policies never can be applied in the electric power industry; our argument does not rest upon implying an antitrust exemption for the private sector of the industry. But as the facts of this case show, the wheeling issue concerns Government power access to customers who—absent the building of Congressionally authorized Government transmission lines or the compulsory wheeling imposed by the district court—would continue to be served with power generated by investor-owned utilities. Thus, at issue here is the basic adjustment of the balance between Government and private power. Antitrust policies articulated by this Court in *Northern Pacific* and in many other cases are wholly inapplicable to this complicated, politically volatile, and Congressionally determined question.

A. The Mixed Government-Private Structure of the United States Electric Power Industry.

The electric power industry in the United States is a unique mixture of public and private participation in the means of production:

> "The electric power industry in the contiguous United States includes nearly 3500 systems which vary greatly in size, type of ownership, and range of functions. It is made up of four distinct ownership segments — investor-owned companies, non-Federal public agencies, cooperatives, and Federal agencies—and is unique among world systems in the diversity and complexity of its organization." FPC, The 1970 National Power Survey (GPO, Dec. 1971), p. I-2-1 (hereafter cited as FPC 1970 Power Survey).

Of these four elements, the investor-owned utilities are predominant when viewed nationally; today they account for about 77 percent of the nation's total generating capacity. FPC 1970 Power Survey, p. I-1-10.

The Government-owned or Government-financed sector of the industry is, however, by no means insignificant. In 1970 this sector accounted for 77,685,000 Kw of this country's generating capacity, a figure equal to half that of the U.S.S.R., and more than that of any other foreign nation. Edison Electric Institute, 1970 Statistical Year Book, p. 6, Table 2S, p. 15, Table 9S (Sept. 1971) (hereafter cited as EEI 1970 Statistics). Moreover, in many regions Government power is produced in greater volume than private power. *See* p. 12, *infra*.

There are five large Federal agencies marketing Federally-generated power — the Tennessee Valley Authority, the Bonneville Power Administration, the Southwestern Power Administration, the Southeastern

Power Administration, and the Bureau of Reclamation. FPC 1970 Power Survey, p. I-2-4. Collectively these five agencies account for about 12 percent of the nation's generating capacity. *Ibid.*

Immediately behind the Federal systems in terms of the contribution which they make to the generation of power are the public non-Federal systems, which collectively account for about 9 percent of total industry power production. FPC 1970 Power Survey, p. I-2-5. Most of these systems are municipal utilities that range from systems as large as the Los Angeles Department of Water and Power, which serves over a million customers (FPC 1970 Power Survey, p. I-2-6), to ones as small as the system now being operated in Elbow Lake, Minnesota. Also included in this category are local public utility districts, which are established to generate and transmit electrical power, as well as state-wide agencies, such as the Arizona Power Authority and the Power Authority of the State of New York, which are involved in both power supply and transmission.

Finally, there are about 1,000 rural electric membership cooperatives that are funded by U.S. Government monies which are administered by REA. Although these cooperatives serve approximately 10 percent of all electric power customers in the United States, their generating capacity is only about 1 percent. FPC 1970 Power Survey, p. I-2-6.

While all investor-owned utilities would be affected in some measure by being compelled to wheel Government power, that requirement would have the most drastic impact upon investor-owned utilities in those regions where Government power is concentrated. Thus, a more realistic view of the division between Govern-

ment and private power for purposes of this case requires consideration of the *sectional* nature of Government power production.

In some areas—for example the six New England states—there is relatively little Government generation of electric power. In 1970 more than 97 percent of the generation capacity in that region was owned by investor-owned utilities. EEI 1970 Statistics, pp. 8-9, Tables 3S & 4S. On the other hand, in the East South Central states—Kentucky, Tennessee, Alabama, and Mississippi—the investor-owned utilities accounted for only 35 percent of generation capacity, with TVA and other Government projects supplying the bulk of the power in that area. *Ibid.* Of particular relevance in this case, the seven states of the West North Central region—Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, and Kansas—showed a 65-35 percent division between investor-owned and Government power. *Ibid.*

B. Congressional and State Legislative Policy Determinations Bar Application of Conventional Antitrust Concepts to Private Wheeling of Government Power.

In view of the significant, and in some regions predominant, role that Government plays in the production of power, a meaningful review of the district court's decision to foster "competition" between the Government and private sectors of the industry, by requiring a private utility to wheel Government power, demands realistic consideration of the differing economic contexts in which the two sectors operate. Specifically, the wholly different costs of capital, tax treatment, and legal controls applicable to the Govern-

ment and private sectors of the industry require careful scrutiny before imposing any requirements upon the private sector to encourage "competition" from the Government sector.

Electrical power production, transmission, and distribution is the nation's most capital intensive industry. In 1970 the U.S. investor-owned electric utilities reported a total of $73,451,000,000 investment in net electric utility plant. EEI 1970 Statistics, pp. 60-61. Moreover, the industry's capital needs over the next two decades will dramatically increase due to the necessity "to serve market growth . . . to replace deteriorated and obsolete plants and to meet new environmental standards." FPC 1970 Power Survey, p. I-20-1. The FPC has estimated that the industry's total capital requirements between 1970 and 1990 may be as much as $500 billion. *Ibid.*

The capital intensive nature of the industry means that the investor-owned utilities must pay a substantial percentage of their operating revenues in interest and dividend payments to attract the capital necessary to sustain the huge investment required for operations. In 1970 investor-owned utilities paid a total of $4,653,000,000 in interest on debt and in dividends on their stock, a sum equal to nearly one fourth of their total gross operating revenues. EEI 1970 Statistics, p. 61.

While the investor-owned utilities must therefore incur very substantial costs to raise capital in competition with other industries, Congress has made it possible for Government power to be financed by other less expensive means. Federal projects, other than the TVA, obtain their capital directly from the U.S. Treasury and

benefit to the extent that the U.S. Government's cost of borrowing is uniformly less than that of private enterprise. FPC 1970 Power Survey, p. I-2-5.

Public non-Federal systems have an even greater advantage in that state and municipal general obligation or revenue bonds are exempt from the Federal income tax and can therefore be floated at interest rates significantly lower than corporate securities. The Government-financed REA cooperatives are in an even more favored position. Under applicable Federal legislation they may borrow from the U.S. Treasury at a 2 percent interest rate, a figure well below the rate at which the Federal government borrows its money and only a fraction of the cost of capital incurred by investor-owned utilities. FPC 1970 Power Survey, p. I-2-7.

The different tax status of the Government and private sectors of the power industry further affects the relationship between the two sectors. Investor-owned electric utilities, like most other businesses in the United States, are subject to the Federal income tax, state and local property taxes, and state income taxes or to more onerous gross receipts or gross income taxes. In 1970 the investor-owned utilities paid more than $3,300,000,000 in taxes. EEI 1970 Statistics, p. 61.

On the other hand, the Federal power agencies are free of any Federal tax obligations on their income or property and for the most part are also free of any state or local taxes. Similarly, the non-Federal public agencies are exempt from Federal income tax and generally are not subject to state income tax. FPC 1970 Power Survey, p. I-2-6. And REA cooperatives, while in many instances subject to state and local property

taxes, are not subject to the Federal income tax.[2] FPC 1970 Power Survey, p. I-2-7.

Finally, "the Federal Power Commission possesses broad accounting regulatory jurisdiction over most investor-owned utilities * * * [whereas] no regulatory agency as such has comprehensive regulatory authority with respect to federal systems." FPC 1964 National Power Survey, Part II, p. 362 (GPO, Oct. 1964). By the same token, public non-Federal systems and REA cooperatives are not subject to the same intensive regulation as the investor-owned utilities. *Ibid.* Accordingly, Government power projects, and particularly hydroelectric plants which serve many purposes in addition to the production of electricity to which the costs of operation can be assigned, have more flexibility in allocating costs to power production than do the investor-owned utilities and can thereby understate, while not actually reducing, the costs incurred in power production.

The costs of raising capital and paying taxes amounts to a sum that is equal to nearly one half of the operating revenues of the investor-owned utilities. EEI 1970 Statistics, p. 61. Since Government power projects, as a result of policy determinations embodied in various Federal and state legislative measures, have significant advantages in both of these areas, as well as a preferenced regulatory status, Government gen-

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[2] REA cooperatives are given tax advantages even with respect to property taxes in the geographic area involved in this case: *Minnesota*—Minn. Stat. 1969, Secs. 273.37 through 273.40, as amended by Chap. 427 Minn. Sess. Laws 1971, Secs. 19 through 21; *North Dakota*—North Dakota Century Code, Vol. 11, 1971 Pocket Supp. Sec. 57-33.1-02; *South Dakota*—South Dakota Compiled Laws 1967, Chap. 10-36.

erated power is less costly to the consumer than the power generated by comparably efficient investor-owned utilities.

Consequently, there can be no "price competition" between the Government and private sectors of the industry in any realistic or commonly understood sense. This is not, of course, to say that Government power agencies are more or less efficiently operated than investor-owned utilities. Rather the price differential between public and private power reflects

> "the lower fixed charges on capital investments in Federal projects by virtue of their lower interest costs and the absence of federal income and other taxes." FPC 1970 Power Survey, p. I-2-5.

Although criticism has been directed toward the subsidization of Government power through low interest rate policies and tax exemptions, *see, e.g., Interest Rates Guidelines for Federal Decision Making,* Hearings before the Subcommittee on Economy in Government of the Joint Economic Committee, Congress of the United States, 90th Cong., 2d Sess., pp. 4-10 (1968), it is not the intention of this brief to argue the merits of the public policy judgments that Congress and the state legislatures have made in determining the proper balance of Government and private participation in the U.S. electric power industry.

But the analysis advanced here of the preferred interest, tax, and regulatory treatment from which the Government sector of the industry benefits does demonstrate that any concept of "price competition" between Government and private power is wholly arti-

ficial and that the purpose of antitrust policy as articulated by this Court, *see, e.g., Northern Pac. Ry.* v. *United States, supra* at 4, and by antitrust theoriticians, *see, e.g.,* Kaysen & Turner, *Antitrust Policy,* pp. 11-14 (1959), simply cannot be applied on a *per se* basis in the unique context of a mixed Government-private industry.

For the application of the antitrust laws to open up "competition" between two sectors that, because of public policy legislative determinations, face different costs and thus sell at different prices, cannot lead to the optimum results that the economic competitive model predicts for private enterprise.

The economic competitive model operates upon the assumption that when all obstacles, such as market control or unreasonable restraints of trade, are eliminated, the price at which competitors sell their product will accurately reflect their costs. The more efficient sellers will accordingly price their product at a level that will induce consumers to purchase from them, thereby insuring that only the lowest cost operators remain in business. See generally, Singer, *Antitrust Economics,* pp. 15-24 (1968). This competitive mechanism thus ensures an optimal allocation of economical resources.

When, however, there is an artificially-induced difference in the costs of differently positioned sellers—as exists in the power industry due to the legislatively-prescribed regulatory, low interest and low tax policies that are enjoyed by Government power—the competitive pricing mechanism will not lead to an optimal allocation of resources. For the prices at which the Government sells to "compete" with investor-owned

utilities do not reflect its true costs and thus do not correspond to its efficiency.[3]

By the same token, the other major goal of antitrust policy—"the preservation of our democratic political and social institutions," *Northern Pac. Ry.* v. *United States, supra* at 4—quite obviously will not be served by the application of rules of law that, like compulsory wheeling, will inevitably lead to an expansion of the Government-controlled sector of the industry at the expense of the independently operated investor-owned utilities and to their economic deterioration and curtailed future.

C. Congress Has Recognized the Inapplicability of the Competitive Pricing Mechanism with Respect to the Disposition of Government Power.

The realities concerning the wholly different economic positions of the Government and private sectors of the electric power industry are reflected in affirmative Congressional action. Instead of relying upon the competitive pricing mechanism to control the disposition of Federally-generated power, Congress has since 1906 provided various forms of statutory preference in the sale and distribution of this less expensive Government power. See Section 5 of the Townsite Act of 1906, 34 Stat. 116, 117; FPC 1970 Power Survey, p. I-2-5.

Section 10 of the Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831(i), is typical of these preference statutes:

> "[In] the sale of such current by the board it shall give preference to states, counties, municipalities,

[3] For the same reason, suggested concepts of "yardstick competition" between the Government and the investor-owned utilities cannot survive careful scrutiny. Government power pricing reflecting lower capital costs and low tax policies cannot be used to measure the reasonableness of an investor-owned utility's rates.

and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: *Provided,* that all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the Board to cancel said contract upon five years' notice in writing, if the Board needs said power to supply the demands of states, counties, or municipalities."

See also Section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), which provides a similar set of preferences for distribution of power from Bureau of Reclamation projects, such as are involved in this case.[4]

These legislative determinations constitute a clear recognition by Congress that Government power, because of its preferred capital cost, tax, and regulatory status, cannot be allocated under competitive pricing theories, but instead must be apportioned according to a statutory set of public policy priorities and preferences.

We have thus far demonstrated that ordinary Sherman Act concepts are of no aid in the resolution by Federal courts of issues concerned with the relationship between Government and private power as it relates to compulsory wheeling. Paramountly then, this Court must consider the public policy decisions made

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[4] See also, Section 4(a) of the Bonneville Project Act, 16 U.S.C. § 832; Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s; Section 44 of the Atomic Energy Act, 42 U.S.C. § 2064, involving similar preferences for Federally-generated power. Congress has even prescribed preferences for power generated by non-Federal governmental agencies. Niagara Project Act, 16 U.S.C. § 836.

by Congress to resolve the wheeling issue that is now before it. For when the courts are asked to deal with situations that do not permit the application of established antitrust concepts, and instead are asked

> "to analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required." *United States* v. *TOPCO Associates,* 405 U.S. 596, 611-12 (1972).

Fortunately, the "judgment of the elected representatives of the people" is crystal clear as to the wheeling issue now before this Court. Congress has repeatedly determined that compulsory wheeling of electric power is not to be required. By an aberrant misapplication of antitrust theory, the courts should not reverse that determination.

II

CONGRESS IN ADJUSTING THE BALANCE BETWEEN GOVERNMENT AND PRIVATE POWER HAS CONSISTENTLY DETERMINED THAT A WHEELING REQUIREMENT SHOULD NOT BE IMPOSED UPON INVESTOR-OWNED UTILITIES.

> *"Mr. Wolverton. Under the provisions of this bill, would it be possible for the Government in any of its electric operations to utilize the transmission lines of private companies?*
>
> *"Mr. DeVane [FPC Solicitor]. No sir; and I want to make that very definite; and if there is any doubt about it, so far as I am concerned, such amendment might be made as to make it clear.*
>
> * * *
>
> *"Mr. Wolverton. Let me suggest a possible situation. Your answer will clarify my mind consid-*

ably as to the effect of this bill in the particular instance: Assume that a municipality built a plant for the generation and distribution of electric energy; assume that a distant community is serviced by a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State. Could the city which has constructed a plant, but has no transmission lines, utilize the system of transmission lines constructed by the private company?

"Mr. DeVane. No sir." Hearings on H.R. 5423 before the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 74th Cong., 1st Sess., pp. 514-15 (1935).

Appellant Otter Tail has conclusively shown in its brief through the analysis of this and other legislative history underlying the Federal Power Act of 1935, 16 U.S.C. §§ 824-824h, that when Congress in 1935 vested jurisdiction in the FPC to regulate interstate electrical utilities it refused to impose an obligation upon them to wheel Government power.

Moreover, as Otter Tail has also demonstrated, Congress not only faced this question in 1935 when the Act was originally passed but has in many succeeding legislative sessions, including those of the last four Congresses, confronted the same question and consistently concluded that a proper demarcation of the Government and private sectors of the power industry barred vesting the FPC with any general authority to impose a wheeling requirement upon investor-owned electrical utilities.[5]

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[5] See, *e.g.*, S. 350, H.R. 2101, 88th Cong., 1st Sess (1963); S. 1472, H.R. 2072, 89th Cong., 1st Sess. (1965); S. 1834, H.R. 2311, 90th Cong., 1st Sess. (1967); S. 1071, H.R. 7016, 7052, 7186, 9557,

Because these rejected legislative proposals would have allowed the FPC to consider its total public interest responsibilities, including any competitive consequences, in deciding whether to impose a wheeling requirement in any particular case, it follows that Congress was *a fortiori* rejecting the imposition of an absolute obligation upon all private utilities always to wheel power for the Government. This Congressional determination should not be subverted by reliance upon inapplicable antitrust concepts.

Congress' refusal to give the FPC authority to compel wheeling is paralleled by affirmative Congressional action recognizing that a utility's decision to wheel Government power is to be resolved by voluntary processes, not Government mandate. For Congress has determined time and again that the problem of investor-owner utilities' wheeling of Government power is to be resolved through arms-length negotiations between the investor-owned utilities and the Government power entities.[6] In so doing, *Congress has made it*

91st Cong., 1st Sess. (1969); S. 294, 2324, H.R. 605, 3838, 5941, 6962, 9970, 92d Cong., 1st Sess. (1971).

See also, Hearings on S. 1472, et al., before the Committee on Commerce, U.S. Senate, 89th Cong., 2d Sess. (1966); Hearings on S. 1934, et al., before the Committee on Commerce, U.S. Senate, 90th Cong., 1st Sess. (1967); Hearings on H.R. 7186, et al., before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 91st Cong., 1st & 2d Sess. (1971); Hearings on H.R. 5277, et al., before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 92d Cong., 1st Sess. (1971).

[6] Appellant has set forth the facts in this record which show that Otter Tail has often negotiated and entered into transmission agreements with the Bureau of Reclamation and with REA cooperatives in its service area. (GX 67, A. 1054-98, A. 253, 286; A. 676-79; A. 31; GX 22, A. 979-1005, A. 286; GX 38, A. 1005-07, A. 286; GX 39, A. 1008-40, A. 286; GX 65, A. 1040-53, A. 286, A. 42; A. 688-95).

clear that the proper response to a failure of this bargaining process is Government construction of transmission facilities, and not the creation of a duty to wheel that would destroy the process.

Typical of these enactments is the "Keating Amendment," first passed in 1951 as a limitation upon the appropriations for the Bureau of Reclamation, P.L. 82-136, 65 Stat. 255, and subsequently appended to every annual appropriation for the Bureau:

> "No part of this appropriation shall be used to initiate the construction of transmission facilities within those areas covered by power wheeling service contracts which include provisions for service to Federal establishments and preferred customers except . . . those facilities for which the Secretary of the Interior finds the wheeling agency is unable or unwilling to provide for the integration of Federal projects or for service to a Federal establishment or preferred customer. . . ."[7]

Both the proponents and opponents of the original Keating Amendment recognized that what was essentially at issue in the passage of this amendment was an adjustment of the bargaining positions of private and Government power with respect to the question of wheeling. Compare the remarks of Mr. Keating, 97 Cong. Rec. 4646 with those of Mr. (now Senator) Jackson, *id.* at 4648:

> "we are trying to give Uncle Sam just sufficient bargaining power to enter into contracts that will provide fair, and equitable, wheeling rights."

An even more sharply focused statement of the Congressional decision to implement voluntary wheeling

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[7] See also e.g., P.L. 82-470, 66 Stat. 445, 451 (1952); P.L. 92-134. 85 Stat. 365, 369 (1971).

arrangements and to deal with an investor-owned utility's refusal to wheel by constructing Government transmission lines, can be found in the 1953 Interior Department Appropriations Act, P.L. 82-470, 66 Stat. 445:

> "No part of the funds appropriated by this paragraph . . . shall be available for the construction of transmission lines and their related facilities in the Southeastern power area until (1) a contract with the affected power companies . . . for systemwide transmission of electric power and energy from Government owned projects to preferred customers has been executed, or the said companies have refused to execute said contracts, and (2) the Secretary of the Interior has so informed the Congress."[8]

In short, Congress has maintained a firm hand in insuring that Government power will be transmitted only through voluntary wheeling agreements or through the construction of transmission facilities. It has clearly and consistently articulated a policy with respect to the transmission of Government preferenced power that relies upon a bargaining relationship with investor-owned utilities to provide appropriate wheeling arrangements and upon the construction of Gov-

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[8] There are many other instances where Congress has taken a direct interest in the negotiations between the Department of the Interior or other Government power agencies and the investor-owned utilities with respect to wheeling arrangements. *See, e.g.*, Sen. Rep. No. 445, Committee on Appropriations, U.S. Senate, 83d Cong., 1st Sess., p. 16 (1953); H.R. Rep. No. 339, Committee on Appropriations, U.S. House of Representatives, 82d Cong., 1st Sess., p. 11 (1951); Sen. Rep. No. 661, Committee on Appropriations, U.S. Senate, 81st Cong., 1st Sess., p. 11 (1949).

ernment transmission facilities in those circumstances where that bargaining process does not provide for satisfactory distribution of Government power. When Congress provided preference power for the public sector, it did not require that this preference power be compulsorily wheeled by the private sector. Instead, it provided appropriations to build transmission lines when wheeling was not available.

The imposition under *per se* antitrust concepts of a requirement of compulsory wheeling by investor-owned utilities of Government preferenced power is flatly inconsistent with this Congressional policy. The Government's policy on wheeling—in this area of adjustment between investor-owned and preferentially supported Government power—as well as antitrust policy, equally derives from Congress. The lower court's decision on wheeling would destroy the bargaining relationship prescribed by Congress, and would effectively place the implementation of Government power transmission policy in the hands of a federal antitrust court instead of Congress.

CONCLUSION

The district court erred in applying the Sherman Act to an investor-owned utility to require it to wheel Government power. The lower court's judgment as to compulsory wheeling is unfounded in terms of basic Sherman Act principles and is inconsistent with controlling Congressional policy decisions as to wheeling in the relationship between the Government and private sectors of the electrical power industry. The judgment should therefore be reversed to the extent that it

imposes an obligaion upon the appellant to wheel Government-generated or Government-funded power.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-991

OTTER TAIL POWER COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF OF FEDERAL POWER COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

OPINION BELOW

The opinion of the district court (App. 1-21)[1] is reported at 331 F. Supp. 54.

JURISDICTION

The Court below entered Findings of Fact and Conclusions of Law (App. 22-107) and its Original

[1] "App." references are to the appendix to the jurisdictional statement filed by Appellant Otter Tail Power Company, No. 71-991.

Judgment (App. 108-111) on October 22, 1971. By order dated November 10, 1971, the Court below denied Otter Tail Power Company's (Otter Tail) motion for new trial or amended findings and conclusions and amended judgment, except to the extent it modified its judgment to require the Federal Power Commission's approval of the terms and conditions of any wholesale or wheeling service (App. 112-13). The amended judgment was entered November 10, 1971 (App. 114-17). Otter Tail filed a Notice of Appeal in the District of Minnesota, Sixth Division, on December 7, 1971 (App. 118-19). This Court noted probable jurisdiction on May 22, 1972. 40 U.S.L.W. 3556. The jurisdiction of this Court is invoked under 15 U.S.C. § 29.

QUESTION PRESENTED

Whether the Federal Power Commission has primary jurisdiction under the Federal Power Act to order compulsory interconnections with public utilities subject to its jurisdiction and to consider anticompetitive factors in determining whether a compulsory interconnection is in the public interest.

STATUTES INVOLVED

Sections 201 and 202 of the Federal Power Act, 16 U.S.C. §§ 824 and 824a, and Section 2 of the Sherman Act, 15 U.S.C. § 2, are set forth in this brief's appendix, *infra*, pp. 26-32.

STATEMENT

This case involves the primary jurisdiction of the Federal Power Commission (Commission) under Section 202 of the Federal Power Act, 16 U.S.C. § 824a, to order a public utility subject to its jurisdiction to interconnect with any person if the Commission finds the interconnection to be in the public interest after considering all relevant issues including anticompetitive factors. In a civil suit brought by the United States Department of Justice, a federal District Court found Otter Tail guilty of attempting to maintain a monopoly and monopolizing the retail distribution of electric power in cities located in its service area, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The Court's decision was based *inter alia* on Otter Tail's refusal to sell at wholesale to municipal power systems within its service area. To remedy this situation the District Court enjoined Otter Tail from such refusal.

One of the municipal power systems which was refused wholesale service by Otter Tail was that of the Village of Elbow Lake, Minnesota, a former retail customer of Otter Tail. Prior to and during the civil suit in the District Court, the Commission conducted proceedings under Section 202(b) of the Federal Power Act, 16 U.S.C. § 824a(b), to consider the application of Elbow Lake for a compulsory interconnection with Otter Tail. After considering all relevant factors and finding it to be in the public interest, the Commission ordered a short-term interconnection on No-

vember 6, 1968,[2] and a long-term interconnection on September 13, 1971.[3]

A. The Antitrust Suit In The District Court

In the civil antitrust suit filed by the government on July 14, 1969, Otter Tail was charged with attempting to preserve a monopoly over the retail sale of electric power to municipalities, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, by refusing to sell at wholesale and refusing to wheel electric power to municipal power systems, and by engaging in other activities to defeat municipalities' attempts to establish municipal power systems (App. 3). After finding that Otter Tail had monopoly power in the relevant market (retail sales of electric power to towns in Otter Tail's service area) (App. 7-8) and had strategic dominance in transmission facilities in its service area (App. 8-10), the Court found that Otter Tail had sought wrongfully to maintain its monopoly power (1) by refusing to use its transmission facilities to sell at wholesale or to wheel power to several municipalities (App. 11-13), (2) by engaging in court litigation to defeat attempts of four municipalities to establish municipal power systems

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[2] *Village of Elbow Lake, Minnesota* v. *Otter Tail Power Co.*, FPC Docket No. E-7278, 40 FPC 1262, affirmed *sub nom. Otter Tail Power Co.* v. *Federal Power Commission*, 429 F.2d 232 (CA 8), certiorari denied, 401 U.S. 947.

[3] *Village of Elbow Lake, Minnesota* v. *Otter Tail Power Co.*, FPC Docket No. E-7278, appeal pending *sub nom. Otter Tail Power Co.* v. *Federal Power Commission*, CA 8, No. 72-1088.

(App. 14-16), and (3) by enforcing the provisions of its contracts with the Bureau of Reclamation and with electric power cooperatives which prohibit the use of Otter Tail's transmission lines to transmit power to former retail customers of Otter Tail (App. 16-18). The Court found these contracts not to be immune to antitrust (App. 18-20). Rejecting Otter Tail's "erosion" argument that a requirement to sell power at wholesale or wheel power to former retail customers would force it to contribute to its own demise because increasing numbers of municipal customers would convert to municipal power systems, the Court stated that such erosion was unlikely because other municipalities could not rely upon the Bureau for power and that the threat of losing business does not justify or excuse violating the law (App. 19-21). The Court thus enjoined Otter Tail from certain conduct, including refusal to sell electric power at wholesale (App. 21, 115-16). The Court's injunction that Otter Tail not refuse to sell at wholesale has the effect of a compulsory interconnection order. It is this portion of the Court's opinion which is the subject of the Commission's brief as *amicus curiae*.

B. The Interconnection Proceedings Before The Commission

Prior to and concurrently with the civil antitrust suit, Otter Tail's refusal to sell power at wholesale to municipal systems was also the subject of proceedings before the Commission. In *Village of Elbow Lake, Minnesota* v. *Otter Tail Power Co.*, *supra* n. 2, 3, the Commission considered the application of

one of Otter Tail's former retail municipal customers, Elbow Lake, for an order pursuant to Section 202 of the Federal Power Act, 16 U.S.C. § 824a, directing interconnection between Elbow Lake and Otter Tail. Elbow Lake alleged that it had an operating municipal electric utility, that it had requested Otter Tail to provide wholesale electric service and wheeling service, that it had two sources of power but no means of transmission to Elbow Lake without Otter Tail's assistance, and that Otter Tail had refused to provide either wholesale or wheeling service (App. 121). By order dated November 6, 1968, the Commission found that a short-term interconnection was in the public interest because Elbow Lake suffered a shortage of installed reserves and because an interconnection would not pose an undue physical burden on Otter Tail (App. 130-131). Accordingly, the Commission ordered a short-term interconnection pursuant to Section 202(b) of the Federal Power Act, 16 U.S.C. § 824a(b), until the completion of studies and hearings on the question of the best long-term transmission and supply arrangements (App. 120-35). 40 FPC 1262, affirmed, *Otter Tail Power Co.* v. *Federal Power Commission*, 429 F.2d 232 (CA 8), certiorari denied, 401 U.S. 947.

Subsequently, on September 13, 1971, the Commission ordered a long-term interconnection between Elbow Lake and Otter Tail (App. 136-153). The interconnection was found to be in the public interest in accordance with Section 202(b) standards, because Elbow Lake's consumers needed assistance and be-

cause Otter Tail would sustain no undue burden, no enlargement of facilities, nor any impairment of its ability to serve its customers thereby (App. 140). The Commission considered fully the possible erosion of Otter Tail's system but found the public interest to be far broader than the economic interest of a particular power supplier (App. 141). The Commission agreed with the Examiner, however, that Elbow Lake had engaged in "an ill-advised excursion into the power business" and the parties' actions had resulted in serious economic waste (App. 140-41). The Commission emphasized that municipalities should identify and study all alternatives and probable consequences before entering into the power business (App. 142). After deciding that an interconnection was in the public interest, the Commission determined the terms it considered fair to the parties and their customers (App. 143-53).

On December 23, 1971, the Commission denied rehearing of its order of September 13, 1971, review of which now is pending in the United States Court of Appeals for the Eighth Circuit, *sub nom. Otter Tail Power Co.* v. *Federal Power Commission*, No. 72-1088.[4]

SUMMARY OF ARGUMENT

Public utilities subject to the Commission's jurisdiction face duplicative litigation of antitrust issues

[4] The only issue which Petitioners have raised in this appeal concerns the terms and conditions of the interconnection order.

in a growing number of administrative and judicial forums. The controversy here involves repetitive judicial and Commission proceedings, both arising out of a federally regulated public utility's refusal to sell at wholesale to a former retail customer and both resulting in compulsory interconnection orders. We submit that the Court below erred in enjoining Otter Tail from refusing to sell at wholesale because Section 202 of the Federal Power Act gives the Commission primary jurisdiction over compulsory interconnections with public utilities subject to its jurisdiction.

A.

As numerous decisions of this Court reveal, the doctrine of primary jurisdiction requires submission to an administrative agency of all issues regarding the legality of conduct subject to its regulatory jurisdiction. This principle has been held many times to bar antitrust actions in federal courts and require parties to litigate all issues, including anticompetitive questions, before the appropriate agency. Under Section 202 of the Federal Power Act the Commission has full authority to coordinate electric facilities and to compel interconnection where it is in the public interest, in order to assure consumers an adequate and economical source of electric power. The decision of the Court below to enjoin Otter Tail from refusing to sell power at wholesale has the effect of a compulsory interconnection order and abrogates the Federal Power Act's grant of such authority to the Commission. Accordingly, the decision should be reversed under the doctrine of primary jurisdiction.

B.

Section 202(b) prescribes a strict public interest standard for compulsory interconnections, yet the Court below applied only antitrust principles before in effect ordering Otter Tail to interconnect with any municipal power system which makes a request. This is contrary to the many decisions of this Court that antitrust laws are just one tool to be used in determining the public interest, and that competition is neither the single nor controlling element in that determination.

Under Section 202(b) the protection of all consumers and the possible alternatives to interconnection are factors in the public interest equation. In addition to anticompetitive factors the Commission is required to consider *inter alia* the possibility of an undue burden upon the public utility, whether an enlargement of generating facilities is required, and whether the public utility's ability to render adequate service to its customers would be impaired. While the Court below failed to consider any issue except anticompetitive effects, the Commission's established practice is to evaluate all factors bearing on the public interest, including potential anticompetitive effects, in compulsory interconnection proceedings. The Commission must be permitted to bring this experience to bear, thereby giving full effect to the requirements of the Federal Power Act and the antitrust laws.

C.

Application of the doctrine of primary jurisdiction is necessary to protect consumers of electric power from the ill effects of dual regulation of public utilities under the Federal Power Act and antitrust laws. This Court and others have recognized the dangers of the collision of these two regimes and the operational chaos which can result from court's independent application of antitrust principles to regulated conduct of public utilities. Faced with the requirements of duplicative litigation of antitrust issues and the probable inconsistency of decisions in various forums, it is increasingly difficult for public utilities to take necessary steps to meet the growing energy demands of consumers. For the consumers' protection within the comprehensive regulatory scheme of the Federal Power Act, such issues must be submitted to the Commission, which has the authority and the experience to properly determine whether the conduct subject to its regulatory jurisdiction is in the public interest.

ARGUMENT

The Federal Power Commission Has Primary Jurisdiction Under The Federal Power Act To Order Compulsory Interconnections With Public Utilities Subject To Its Jurisdiction And To Consider Anticompetitive Factors In Determining Whether A Compulsory Interconnection Is In The Public Interest.

This case presents a classic example of the problem of accommodating antitrust policy to regulatory policy, within a bifurcated system of enforcement.

Public utilities subject to the Commission's jurisdiction under Section 201 of the Federal Power Act, 16 U.S.C. § 824, face a growing antitrust gauntlet of repetitive administrative agency hearings and court litigation each time they act. Decisions of United States Courts of Appeals have subjected them, erroneously we have argued elsewhere, to duplicative litigation of antitrust issues in numerous administrative forums, even in proceedings where antitrust allegations are not directly related, such as the authorization of securities issuances. See *e.g.* Brief for the Federal Power Commission in *Gulf States Utilities Company* v. *Federal Power Commission*, No. 71-1178. The decision of the Court below superimposes on the various agency proceedings a judicial arena in which the same antitrust issues can be tried, regardless of administrative jurisdiction and public interest standards. The resulting burdens and potentially inconsistent results from such multiplicitous litigation of antitrust issues will have dire effects on such public utilities' ability to fulfill their responsibility to meet the energy needs of consumers. If these companies are to be effectively regulated so as to protect the public interest, courts must be required to apply the doctrine of primary jurisdiction,[5] to permit the Com-

[5] This Court should properly apply the doctrine of primary jurisdiction even if it is not raised at an earlier stage in the proceedings for, being a question of the proper allocation of business between the courts and administrative agencies, it is not subject to waiver. *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63; *Louisiana & Arkansas Ry.* v. *Export Drum Co.*, 359 F.2d 311, 314 (CA 5).

mission to employ its regulatory experience and to evaluate all factors, including anticompetitive issues, relevant to a determination of whether an interconnection should be ordered.

A. *The Doctrine of Primary Jurisdiction Requires Initial Submission To The Commission Of All Issues Regarding Compulsory Interconnections Subject To Its Jurisdiction.*

As this Court has stated, "The doctrine of primary jurisdiction * * * applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its view." *United States* v. *Western Pacific R.R.*, 352 U.S. 59, 63-64. The doctrine is based on the principle "that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over," *Far East Conference* v. *United States*, 342 U.S. 570, 574, and "requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme," *United States* v. *Philadelphia Nat. Bank*, 374 U.S. 321, 353. The Federal Power Act presents just such a regulatory scheme for the coordination of electric facilities, with one ex-

pert agency charged with the task of coordination and with a specialized public interest standard prescribed for compulsory interconnections, which the District Court erroneously ignored in enjoining Otter Tail from refusing to sell power at wholesale.

Following an extensive federal investigation of public utilities,[6] Congress enacted Parts II and III of the Federal Power Act,[7] authorizing the Commission to regulate both the financial practices and operations of public utilities subject to its jurisdiction. As part of this comprehensive regulatory scheme for the protection of consumers and investors, Congress provided for the regional coordination of electric facilities, under the supervision and direction of the Commission. Section 202, 16 U.S.C. § 824a. In addition to delegating to the Commission the task of coordination, Congress committed the question of interconnection in most instances to voluntary agreement by public utilities. Section 202(a), 16 U.S.C. § 824a(a), provides in pertinent part:

> For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country

[6] See Federal Trade Commission, *In Response to Sen. Res. No. 83, Monthly Reports on the Electric Power and Utilities Inquiry*, S. Doc. No. 92, Pts. 1-84II, 70th Cong., 1st Sess. (1928-36).

[7] Title II of the Public Utility Act of 1935, 49 Stat. 838.

> into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy * * *. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. * * *

However, Congress was not unaware that situations like the one at bar would develop in which voluntary agreement to an interconnection could not be reached. Accordingly, it authorized the Commission to order compulsory interconnections and prescribed a public interest standard to be applied in such instances. Section 202(b), 16 U.S.C. 824a(b), provides in pertinent part:

> Whenever the Commission * * * finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. * * *

Jurisdiction to coordinate electrical facilities and order compulsory interconnection is thus clearly

vested in the Federal Power Commission. The order of the District Court, which has the effect of ordering a compulsory interconnection, constitutes an abrogation of these provisions of the Federal Power Act.

Since 1922 this Court has forbidden judicial intrusion into the administrative bailiwick by consistently applying the doctrine of primary jurisdiction to require submission to regulatory agencies of cases involving antitrust issues. In *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, the doctrine was held to bar an antitrust suit for treble damages for rates allegedly fixed conspiratorially by railroads subject to the ICC's regulatory jurisdiction. This Court pointed out that parties had a remedy before the ICC for rates found to be unreasonably high or discriminatory and could not believe "that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-trust Act . . ." *Id.* at 162. In ruling in another case that a party could not bring an antitrust action based on conduct subject to the provisions of the Shipping Act, this Court ruled that when the enumerated ~~of~~ antitrust charges are so interrelated with provisions of regulatory legislation, the remedy is that afforded by such legislation, which to that extent supersedes the antitrust laws. *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485.

The same "firmly established principle" of primary jurisdiction was held to bar the government

from suing for an injunction of shipping companies' use of a dual-rate system as a violation of the Sherman Act. *Far East Conference* v. *United States*, *supra*. This Court held in that case that the question of the legality of the dual-rate system must be submitted to the federal agency. In *Terminal Warehouse Co.* v. *Pennsylvania R.R.*, 297 U.S. 500, this Court held that a warehouse owner could not bring an antitrust action attacking an exclusive arrangement between a railroad and a warehouse, saying (*id.* at 514):

> * * * Certain then it is that the Anti-Trust Laws are inapplicable in all their apparent breadth to carriers by rail or water. A consignor or consignee aggrieved by such a wrong must resort to the appropriate administrative agency, at least for many purposes. If he is remitted to the Commerce Act or the Shipping Act to cancel the illegal preference, may he pass over those acts and revert to the Clayton or the Sherman Act for the purpose of recovering damages? The Commerce Act like the Shipping Act embodies a remedial system that is complete and self-contained. It provides the means for ascertaining the existence of a preference, but it does not stop at that point. As already shown in this opinion, it gives a cause of action for damages not only against the carrier, but also against shippers and consignees who have incited or abetted. For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive. * * *

Section 202 of the Federal Power Act similarly embodies a complete system for the coordination of electric facilities, stopping not with the Commission's authority to plan and encourage voluntary agreements but instead granting it plenary authority to order compulsory interconnections it finds to be in the public interest. In *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, this Court held that the government's suit under the Sherman Act against two airline companies for their agreement allocating territories and routes was banned because the problem of division of territories and routes lay within the purview of the CAB under the Civil Aeronautics Act of 1938, as amended by the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*

Under these cases it is clear that the only remedy for Otter Tail's refusal to sell power at wholesale is provided by Section 202(b) of the Federal Power Act, and that the Commission has primary jurisdiction to consider the legality of such refusal and whether a compulsory interconnection would be in the public interest. This Court recently recognized the Commission's authority over compulsory interconnection orders, *Gainesville Utilities Dept* v. *Florida Power Corp.*, 402 U.S. 515, 521-2, yet this authority was ignored by the Court below.

In addition to Section 202's express grant of authority to the Commission, this Court's reasoning in *Far East Conference* as to why cases should be submitted to the administrative agency dictates the same procedure in the case of compulsory interconnections:

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure. 342 U.S. at 574-5.

The "circumstances underlying legal issues" in this case involve Congress' provision in the Federal Power Act for the planned coordination of the electric power industry, in order to assure customers an adequate and the most economical supply of electric energy. The Senate Report interpreted Section 202 as follows:

> Under this subsection[(a)] the Commission would have authority to work out the ideal utility map of the country and supervise the development of the industry toward that ideal. The Committee is confident that enlightened self-interest will lead the utilities to cooperate with the Commission and with each other in bringing about the economies which can alone be secured through the planned coordination which has long been advocated by the most able and progressive thinkers on the subject.
>
> When interconnection cannot be secured by voluntary action, subsection (b) gives the Commission limited authority to compel interstate utilities to connect their lines and sell or exchange energy * * *. S. Rep. No. 621, 74th Cong., 1st Sess. 49 (1935).

This legislative scheme of planned coordination by the Commission, voluntary cooperation by public utilities, and compulsory interconnection when in the public interest, is defeated by the District Court's *ad hoc*, narrow application of *per se* antitrust standards to Otter Tail's refusals to sell or exchange power. Therefore, if Congressional goals under the Federal Power Act are to be achieved, the decision must be reversed.

B. *Compulsory Interconnections With Public Utilities Subject To The Commission's Jurisdiction Should Be Ordered Only If They Meet The Public Interest Standard Of Section 202(b) Of The Federal Power Act.*

Section 202(b) prescribes a public interest standard for compulsory interconnections, and the law is clear that the public interest requires the consideration of more than merely antitrust principles. Indeed, this Court and others have specifically held that if a regulatory agency determines a company's action to be in the public interest, it can authorize the action, though it might otherwise violate antitrust laws. *Seaboard Air Line R.R.* v. *United States*, 382 U.S. 154, 156-7; *Northern Natural Gas Co.* v. *Federal Power Commission*, 399 F.2d 953, 961 (CADC). Antitrust laws are another tool which a regulatory agency may employ to a greater or lesser degree to give "understandable content to the broad statutory concept of the 'public interest.'" *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244.

The decision of the Court below effectively destroys public interest standard which Congress intended to govern compulsory interconnection, and substitutes instead the single narrow antitrust standard. No adequate consideration was given to the continued viability of Otter Tail or its ability to render adequate service to other customers. Neither was there any consideration of whether some other power arrangements might afford better and more economical protection, yet the Commission considered both of these items in the orders in its Otter Tail-Elbow Lake interconnection proceedings (App. 130-1, 141-3). In contrast, the Court below asked only (1) if Otter Tail had monopoly power and (2) if Otter Tail had tried to preserve that monopoly; it found affirmative answers to these questions and therein *per se* antitrust violations. The Court dismissed Otter Tail's "erosion theory" with general findings about the probable future generating capacity of only one competing source of power and with the statement that the "threat of losing business does not justify or excuse violating the law" (App. 20-21). Such a sterile application of antitrust law clearly does not satisfy this Court's decision that the encouragement of competition is not the single or controlling reliance for safeguarding the public interest. *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 93.[8]

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[8] In *RCA Communications* this Court ruled that the regulatory agency had to do more than assume the advantages of competition before licensing radiotelegraph facilities which duplicated existing facilities. It follows that a fed-

The assertion of primary jurisdiction in this case is entirely consistent with the Commission's established practice of evaluating potential anticompetitive effects in compulsory interconnection proceedings. In its opinion of September 13, 1971, in the Elbow Lake proceedings the Commission considered the possible consequences of increased municipal competition and the loss of Otter Tail as a competitior (App. 141). Moreover, in a recent leading interconnection case, the Commission evaluated the alleged competition between a public utility and a municipal system and found that it did not impose any undue burden on the public utility required to interconnect. *Gainesville Utilities Dept.* v. *Florida Power Corp.*, 40 FPC 1227, 1241, affirmed *Gainesville Utilities Dept.* v. *Florida Power Corp., supra.* The Commission has thus complied with this Court's requirement that an agency utilize its "insight gained through experience" in examining the factor of competition when determining the public interest. *Federal Communications Commission* v. *RCA Communications, Inc., supra* at 93-97. The Commission is clearly the only forum which can bring experience to bear in evaluating all factors, including anticompetitive issues, in determining if a compulsory interconnection with a public utility is in the public interest.

---

eral court should not be able to order Otter Tail to interconnect with all willing competitors in order to promote competition. What may substantially lessen competition in those areas where competition is the main reliance for regulation of the market cannot be automatically transplanted to areas in which active regulation is entrusted to an administrative agency. 346 U.S. at 98.

C. *Public Utilities Subject To The Commission's Jurisdiction Should Not Be Subject To Duplicative Litigation Of Anticompetitive Issues.*

The need to prevent the dual regulation of companies has been frequently recognized. As one authority accurately phrased the problem: [9]

> The doctrine of primary jurisdiction is essential to effective regulation. Without it members of regulated industries would be subject to the commands of two masters—the regulatory statute as administered by the agency and the antitrust laws as administered by the courts.

These different laws can be coordinated only if the Commission is permitted to apply both. As this Court stated in *Pan American World Airways*, *supra* at 310, "if the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide."

The decision of the Court below permits parallel litigation in at least two or more arenas, placing public utilities in the untenable position of having to litigate the same antitrust issues in different forums, subject to different standards and subject to judicial review in different Courts of Appeals. The burden of meeting such heavy litigation demands can spell the ruin of a public utility, to the certain detriment of consumers depending upon it to supply their power needs. The probable inconsistency in different deci-

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[9] Von Mehren, *The Antitrust Laws & Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, 965 (1954).

sions reviewing a Commission order and a judicial antitrust decision, given the dichotomy of public interest and *per se* antitrust standards, can paralyze even a healthy public utility and prevent it from taking action necessary to supply consumers' power needs. "[T]he time has come when this duplicative and . . . anachronistic system of dual regulation should be reexamined." *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 664 (separate opinion).

The Court of Appeals for the District of Columbia Circuit has also recognized this problem of multiple forums in holding that the Federal Communications Commission has primary jurisdiction over a telephone company's alleged prohibition against its customers dealing with the producer of a new phone device. *Carter* v. *American Tel. & Tel. Co.*, 365 F.2d 486 (CA 5), certiorari denied, 385 U.S. 1008. While such conduct might constitute a *per se* violation of antitrust laws, the Court in *Carter* stressed its relationship to matters within the Commission's jurisdiction and held that the Commission must be permitted to rule on the conduct's legality, in order to prevent operational chaos. *Id.* at 496. This Court can and should prevent such chaos in the instant case by giving effect to Congress' delegation of primary jurisdiction over compulsory interconnections to the Commission. "The extravagant brandishings of antitrustees, the repetition of inflammatory epithets of . . . monopolistic aim, the frequent incantation of the antitrust laws, and the fervent desire to keep the case . . . in a Federal Court cannot extinguish the [Federal Power Act]

. . ." *Id.* at 494. This Court should reverse the decision of the Court below, which has "the effect of placing the Department of Justice in the driver's seat even though Congress has lodged primary regulatory authority elsewhere." *United States* v. *El Paso Natural Gas Co.*, *supra* at 664 (separate opinion).

While advocating that the District Court erred in in the present case through its failure to apply the doctrine of primary jurisdiction, we recognize that public utilities may in some situations engage in conduct raising antitrust issues which can be reached by litigation in the District Court. However, where the remedy sought is clearly within the jurisdiction of the Commission—such as a compulsory interconnection—the administrative process should not be avoided, and the Commission should be permitted to make its decision on the basis of all public interest considerations, including the impact upon competition. Otherwise, there can be no adequate protection for the broad consuming public which is the intended beneficiary of the Federal Power Act.

CONCLUSION

For the reasons stated, the judgment of the District Court should be reversed.

Respectfully submitted.

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JOAN E. HEIMBIGNER,
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Federal Power Commission.

I authorize the filing of the above brief.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

APPENDIX

The Federal Power Act provides in pertinent part:

Sections 824 and 824a, 16 U.S.C. §§ 824a, 824a(a)

§ 824. Declaration of policy; application of subchapter; definitions

(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in sections 824-825r of this title and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over the facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in said sections, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over fa-

cilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of sections 824-824h of this title, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in sections 824-824h of this title, means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in sections 824-825r of this title means any person who owns or operates facilities subject to the jurisdiction of the Commission under sections 824-824h of this title.

(f) No provision in sections 824-824h of this title shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. June 10, 1920, c. 285, § 201, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 847.

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries—Regional districts; establishment; notice to State commissions

(a) For the purpose of assuring an abundant supply of electric energy throughout the United States

with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State Commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

Sale or exchange of energy; establishing physical connections

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will

be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged n the transmission or sale of electric energy, to sell energy to or exchange energy with such persons; *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

Temporary connection and exchange of facilities during emergency

(c) During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carry-

ing out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

Temporary connection during emergency by persons without jurisdiction of Commission

(d) During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: *Provided*, That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: *Provided further*, That upon approval of the Commission permanent connections for emergency use only may be made hereunder.

Transmission of electric energy to foreign country

(e) After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order

upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate.

Transmission or sale at wholesale of electric energy; regulation

(f) The ownership or operation of facilities for the transmission or sale of wholesale or electric energy which is (a) generated within a State and transmitted from that State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this subchapter. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection (e) of this section. June 10, 1920, c. 285, § 202, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 487, and amended Aug. 7, 1953, c. 343, 67 Stat. 461.

The Sherman Act provides in pertinent part:

Section 2, 15 U.S.C. § 2

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-991

OTTER TAIL POWER COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Minnesota

BRIEF

Of the Village of Elbow Lake, Minnesota Amicus Curiae in Support of Appellee

QUESTIONS PRESENTED

1. Is Otter Tail's program of monopoly maintenance, including its refusals to sell electric power at wholesale, excused from the sanctions of the Sherman Act by the Federal Power Act, even though the Federal Power Act does not provide an express exemption from the Sherman Act, and even though the Federal Power Act does not amount to a pervasive regulatory scheme?

2. Is Otter Tail's program of monopoly maintenance, including its refusals to wheel (transmit) electric power, excused from the sanctions of the Sherman Act by the Federal Power Act, even though the Federal Power Act does not provide an express exemption from the Sherman Act, and even though the Federal Power Act does not deal at all with wheeling of electric power?

3. Are Otter Tail's restrictive contracts concerning the wheeling of electric power excused from the sanctions of the Sherman Act, even though their purpose and effect is to maintain Otter Tail's monopoly in electric distribution markets?

4. Is Otter Tail excused from the sanctions of the Sherman Act by so-called "special circumstances" in the electric industry?

STATEMENT OF THE CASE

The Village of Elbow Lake, Minnesota, appears as an amicus curiae.

Elbow Lake is interested in this appeal as a victim of the monopolistic activity of the defendant and appellant, Otter Tail Power Company.

The predatory conduct of Otter Tail towards Elbow Lake is summarized by the Memorandum and Order of Judge Devitt, below. See **United States of America v. Otter Tail Power Company**, 311 F. Supp. 54, at page 60; A. 27, 36-37. A more detailed catalog of Otter Tail's monopolistic behavior towards Elbow Lake is set forth in the District Court's Findings of Fact (all with supporting record references) numbered 9 through 59, and 195 through 226; A. 47, 50-61, 91-129. (Appendix references herein, denoted "A", refer to the appendix filed by Otter Tail with its brief. For the most part, factual references are to the Findings of Fact, by Finding numbers and

appendix pages. Since there are no significant issues of fact, testimony and exhibit references are minimized. There are no significant issues of fact on this appeal, but only issues of law as to the legal consequences of facts found by the District Court.)

Otter Tail Power Company is in the business of selling electricity in western Minnesota and eastern North Dakota and South Dakota. It has an integrated system, with electric generation, transmission and local distribution facilities. As a part of its business, Otter Tail also transmits or "wheels" electricity for others, over its transmission system. Findings Nos. 4-7, A. 48; A. 658-69, 682-83.

The court below found that Otter Tail has a monopoly of the retail sale of electric power in the area, and in each town in which it serves, and that it has a monopoly over the transmission of electric power in the area. Findings Nos. 183-201, A. 86-101; Conclusion No. III, A. 129.

The people of Elbow Lake voted in 1962 to establish a municipal electric utility, for the Village to provide local distribution of electric power to its people. Finding No. 23, A. 53.

Otter Tail, which had been selling electricity in Elbow Lake, attempted to thwart the new municipal project by litigation. Finding No. 28, A. 54. That litigation failed, Findings Nos. 30 and 35, A. 54 and 56, but succeeded in delaying the establishment of the local electric utility. Finding No. 36, A. 56.

As another means of resisting the implementation of Elbow Lake's election to establish its municipal electric system, Otter Tail exercised its monopoly of electric transmission lines in the area, by refusing to sell electricity to the Elbow Lake municipal utility at wholesale and by re-

fusing to "wheel" (transmit)[1] electric energy from other sources to the Village of Elbow Lake. Findings Nos. 24, 37, 42, 44, 48, 49, 51 and 56; A. 53, 56, 57, 58, 59, 60 and 61.

Elbow Lake had electric power available from several sources, including the United States Department of Interior, Bureau of Reclamation, Findings No. 33, A. 55, Basin Electric Power Cooperative, Findings Nos. 49 and 57, A. 59 and 61, United Power Association, Finding No. 44, A. 58 and Runestone Electric Cooperative, Findings Nos. 50, 52, 53, 55 and 56; A. 59, 60 and 61.

Although Elbow Lake had power available from these several sources, the only feasible means of delivery of the available power to Elbow Lake's local electric distribution system was, and is, Otter Tail's transmission system. Finding No. 200, A. 99-101.

Otter Tail used its monopoly over transmission facilities to prevent Elbow Lake from obtaining power from other suppliers. Finding No. 201, A. 101.

Otter Tail's refusals to deal with Elbow Lake forced Elbow Lake to build its own generator. Finding No. 58, A. 61; A. 293-94. Thus, Otter Tail's refusals to deal have imposed additional burdens on Elbow Lake; its refusals to deal have "extract(ed) a monopolist's advantage." **Gamco, Inc. v. Providence Fruit and Produce Building, Inc.**, 194 F.2d 484, 487 (1st Cir. 1952). See also **National Screen Service Corp. v. Poster Exchange, Inc.**, 305 F. 2d

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[1] "Wheeling is where A, which has excess generating capacity, seeks to transmit power to its customer C, with whom it has no transmission connection, by using the transmission facilities of B, which has connections with both A and C." **Florida Power Corporation v. Federal Power Commission**, 425 F.2d 1196, 1202, n. 17 (5th Cir. 1970). In the circumstances of the case before the court on this appeal, "B" is Otter Tail, "C" is Elbow Lake, and "A" is any of the several sources which has power available for Elbow Lake.

647, 652 (5th Cir. 1962) ("... the possibility of obtaining substitute facilities is not a sufficient answer if in fact there is a monopoly.")

Otter Tail had, and has, a monopoly over transmission facilities, but has continued to refuse to deliver power to Elbow Lake. In Judge Devitt's words:

> "Otter Tail employed its dominance in transmission in the Elbow Lake area to prevent Elbow Lake from obtaining electric power from outside sources of supply." 331 F. Supp., at 60; A. 37.

Stated otherwise, Otter Tail has employed its monopoly over transmission facilities to hinder competition by municipal utilities in the local distribution business, and to maintain Otter Tail's monopoly in the local distribution business.

It is significant that Otter Tail never claimed engineering infeasibility as a reason for its refusals to deal with Elbow Lake. Findings Nos. 218 and 219, A. 126. Quite the contrary, Otter Tail admits, albeit in self exculpatory language, that its refusals to deal are motivated only by a desire to retain its monopoly free from competition by emerging municipal electric utilities. Answer, Paragraph II; A. 18; A. 682-83; 703-05, 804-06.

SUMMARY OF ARGUMENT

This brief *amicus* will not argue all the issues in this action, since it is expected that they will be dealt with fully by the brief of the United States.

Among the issues which will not be presented here are the definition of the relevant markets, Otter Tail's monopoly power in those markets, and its active monopolizing by litigation.

The arguments presented in this *amicus* brief are a summary of the refusal to deal and restrictive contract issues (Points I and III, infra), and more extensive discussion of the Sherman Act's application to the electric industry, even though certain aspects of the industry are also subject to the Federal Power Act (Point II, infra), and even though Otter Tail claims the electric industry has "special circumstances" which relieve the electric industry from the proscriptions of the Sherman Act (Point IV, infra).

Otter Tail's refusals to deal with Elbow Lake, its refusals to sell electric power at wholesale and its refusals to wheel electric power available from other generating sources are illegal under the "**Colgate** doctrine", because they are motivated with a purpose to maintain a monopoly.

Otter Tail's refusals to sell power at wholesale are not relieved from the sanctions of the Sherman Act by the Federal Power Act, even though wholesale electric transactions are subject to the Federal Power Act, because the Federal Power Act is not a pervasive regulatory scheme, does not supplant the Sherman Act insofar as the electric industry is concerned, and does not specifically confer antitrust immunity.

The Federal Power Act does not exempt Otter Tail's refusals to wheel power from the Sherman Act. There is not even an arguable basis for an implied exemption, because the Federal Power Act does not deal with wheeling at all. Nor does the Federal Power Act specifically exempt wheeling transactions, or refusals to wheel, from the Sherman Act.

Otter Tail's restrictive contracts are not valid ancillary restraints, because they have the effect of maintaining a monopoly. "Ancillary restraints" are valid only if

they are "reasonable". The rule of reason is never applied to sustain monopolistic conduct.

So called "special circumstances" of the electric industry, its tendency to monopoly, do not relieve transactions in the industry from the Sherman Act. On the contrary, the monopoly tendencies of the industry are exactly why the Sherman Act's proscription against active monopolizing must be applied, to prevent the abuse of monopoly power.

ARGUMENT

POINT I

Otter Tail's Refusals to Deal Are Motivated by a Desire to Maintain Its Monopoly, and Are Therefore Violations of the Sherman Act.

Otter Tail has refused to deal with Elbow Lake. It has refused to sell power at wholesale and has refused to wheel power from other generating sources to Elbow Lake. Finding No. 201, A. 101.

There is no reason for Otter Tail's refusals, other than its desire to maintain its position in the electric distribution business, free of competition. Findings Nos. 218-219; A. 126; Answer, Par. II, A. 18; A. 682-83, 703-05, 804-06.

There is no doubt that a refusal to deal with a purpose to maintain a monopoly is illegal under Section 2 of the Sherman Act.

Consideration of refusals to deal begins with **United States v. Colgate and Co.**, 250 U.S. 300 (1918), where a manufacturer was charged with price fixing by threatening to refuse to sell to customers if they sold below suggested price. The court had this to say regarding unilateral refusals to deal:

> "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." 250 U.S. at 307.

While most cases concerned with the **Colgate** rule have alleged combinations in violation of Section 1 of the Sherman Act, see e.g., **United States v. Parke, Davis and Co.**, 362 U.S. 29 (1960), and cases cited therein, the rule has

also been applied in Section 2 monopoly cases. Notable among these are **Continental Ore Co. v. Union Carbide & Carbon Corp.**, 370 U.S. 690 (1962); **Lorain Journal Co. v. United States**, 342 U.S. 143 (1951); **Eastman Kodak Co. v. Southern Photo Materials Co.**, 273 U.S. 359 (1926); **Six Twenty-nine Productions, Inc. v. Rollins Telecasting Inc.**, 365 F. 2d 478 (5th Cir. 1966); **National Screen Service Corp. v. Poster Exchange, Inc.**, 305 F. 2d 647 (5th Cir. 1962), 362 F. 2d 571 (5th Cir. 1966); **Packaged Programs, Inc. v. Westinghouse Broadcasting Co.**, 255 F. 2d 708 (3d Cir. 1958); **Gamco, Inc. v. Providence Fruit and Produce Bldg.**, 194 F. 2d 484 (1st Cir. 1952), and **United States v. Klearflax Linen Looms**, 63 F. Supp. 32 (D. Minn. 1945).

All of these cases held that refusals to deal which are part and parcel of a "purpose to create or maintain a monopoly", to use the words of the opinion in the **Colgate** case, are violations of Section 2 of the Sherman Act.

The **Continental Ore, Eastman Kodak, Six Twenty-nine Productions, National Screen Service, Packaged Programs,** and **Klearflax** cases all support the principle that one with a monopoly power at one level of an integrated business violates the Sherman Act if he utilizes that power to hinder competition at another level of the business. Thus, it is a violation of the Sherman Act for Otter Tail to employ its monopoly over transmission resources to hinder competition in the local distribution and retail sale of electricity.

An individual refusal to deal is, in essence, an individual boycott. Group boycotts are illegal per se. See, e.g. **Fashion Originators Guild v. Federal Trade Commission**, 312 U.S. 457 (1941), **Associated Press v. United States**, 326 U.S. 1 (1945), and **Times-Picayune Pub. Co. v. United States**, 345 U.S. 594 (1953). A group's restrictive conduct (Section 1 of the Sherman Act) and monopolist's same practice (Section 2 of the Sherman Act) are really

one, since a monopolist, by definition, has at least as much effective economic power as any combination. **United States v. Aluminum Company of America**, 148 F. 2d 416, 428 (2d Cir. 1945), quoted with approval in **American Tobacco Co. v. United States**, 328 U.S. 781 (1946). A monopolist's refusal to deal is the functional equivalent of a boycott. Therefore, a monopolist's refusal to deal, being essentially the same as a group boycott, ought to be illegal per se.

The concept that a monopolist has no right to refuse to deal is not only supported by such reasoning; it is also the essence of the principal refusal to deal cases. See **Continental Ore Co. v. Union Carbide & Carbon Corp.**, 370 U.S. 690 (1962); **Lorain Journal Co. v. United States**, 342 U.S. 143 (1951); **Eastman Kodak Co. v. Southern Photo Materials Co.**, 273 U.S. 359 (1926); **Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.**, 365 F. 2d 478 (5th Cir. 1966); **National Screen Service Corp. v. Poster Exchange, Inc.**, 305 F. 2d 647 (5th Cir. 1962), 362 F. 2d 571 (5th Cir. 1966); **Packaged Programs, Inc. v. Westinghouse Broadcasting Co.**, 255 F. 2d 708 (3d Cir. 1958); **Gamco, Inc. v. Providence Fruit and Produce Bldg.**, 194 F.2d 484 (1st Cir. 1952), and **United States v. Klearflax Linen Looms**, 63 F. Supp. 32 (D. Minn. 1945).

The concept that a monopolist has no right to refuse to deal is also the basis of the "bottleneck" cases, that scarce resources must be shared on fair terms. **United States v. Terminal Railroad Association**, 224 U.S. 383 (1912); **Gamco, Inc. v. Providence Fruit and Produce Building, Inc.**, supra; **Packaged Programs, Inc. v. Westinghouse Broadcasting Co.**, supra; **Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.**, supra. See also **Associated Press v. United States**, 326 U.S. 1 (1945).

This action presents a fitting occasion for the announcement of a "per se" rule, that monopolists have no right to

refuse to make their monopolized resources available to others, on fair terms.

If a per se ruling is eschewed, that would not relieve Otter Tail from Sherman Act liability for its refusals to deal. It has a monopoly of electric transmission facilities, it has a monopoly of electric distribution business, and, though it makes its transmission resources available to some, it refuses to make its transmission resources available to others who are regarded as a threat to Otter Tail's monopoly of the electric distribution business. Findings Nos. 218-219; A. 126; Answer, Par. II, A. 18; A. 682-83, 703-05, 804-06. This kind of refusal to deal, motivated to maintain a monopoly, is a violation of Section 2 of the Sherman Act, according to the **Colgate** doctrine.

Much of Otter Tail's arguments reduce simply to this, it wants to do business the way it wants to do business, free of the operation of the antitrust laws. It wants to do business its monopolistic ways, regardless of national policy to the contrary. More specifically, it does want to be allowed to continue its monopoly maintenance program of refusals to deal, it does not want to sell power at wholesale, or to wheel power to municipal utilities.

In the United Shoe cases, **United States v. United Shoe Machinery Corp.**, 110 F. Supp. 295 (D. Mass. 1953), **aff'd per curiam**, 347 U.S. 521 (1954) and **Hanover Shoe, Inc. v. United Shoe Machinery Corp.**, 245 F. Supp. 258 (M.D. Pa. 1965), 377 F. 2d 776 (3d Cir. 1967, 392 U.S. 481 (1968), a shoe machinery manufacturer which had a monopoly was compelled to abandon its "lease only" system of distribution. It was compelled to sell as well as lease its machines, offer leases on modified terms, and to grant licenses of its patents, all to break the monopoly. Thus, a supplier does not have freedom of marketing methods if it is a monopolist.

If a monopolist may be ordered to use new marketing techniques to break the monopoly, then surely a monopolist can be required to extend existing marketing techniques to a potential customer with whom it refuses to deal. That is what Elbow Lake is seeking: an opportunity to do business with Otter Tail, the transmission monopolist, on the same basis as Otter Tail deals with other municipal utilities. A. 667-68, 682-83. Precisely this form of relief was ordered in **Gamco, Inc. v. Providence Fruit & Produce Bldg.**, 194 F. 2d 484, 489, **cert. denied**, 347 U.S. 817 ("... the plaintiff should be accorded space in the building as a tenant on terms similar to those accorded others, at once if possible . . ."), and in **United States v. Terminal Railroad Association**, 224 U.S. 383 (1912), where an injunction was ordered to provide for the use of terminal facilities by excluded railroads. See also **Six Twenty-nine Productions, Inc. v. Rollins Telecasting, Inc.**, 365 F. 478 (5th Cir. 1966) and **National Screen Service Corp. v. Poster Exchange, Inc.**, 305 F. 2d 647 (5th Cir. 1962) where it was held on summary judgment proceedings that the plaintiffs did state an appropriate claim for injunctive relief in refusal to deal cases.

Otter Tail has a monopoly. Its use of its monopoly power is subject to the Sherman Act. **United States v. Griffith**, 334 U.S. 100 (1948); **United States v. Aluminum Company of America**, 148 F. 2d 416 (2d Cir. 1945). It may not use its monopoly power by refusing to deal with a purpose to maintain its monopoly.

POINT II

The Federal Power Act Does Not Relieve Otter Tail From the Sherman Act's Prohibition Against Monopolizing by Refusals to Deal.

Elbow Lake has commenced both Federal Power Commission proceedings and a Sherman Act action in Federal District Court, in order to obtain delivery of electric power

which has so far been denied by Otter Tail's refusals to sell power to Elbow Lake at wholesale and its refusals to wheel power to Elbow Lake from outside sources.

On March 16, 1966, Elbow Lake commenced Federal Power Commission proceedings against Otter Tail under Federal Power Act Section 202(b), seeking an order to compel Otter Tail to interconnect with Elbow Lake's municipal utility, to provide a means for Elbow Lake to obtain power from outside sources. FPC Docket No. E-7278. Elbow Lake requested that Otter Tail be required to sell power at wholesale to Elbow Lake, and be required to wheel power from Elbow Lake's other sources to the local system.

In September of 1967, Elbow Lake commenced an action against Otter Tail in Federal District Court, alleging that Otter Tail's refusals to wheel power to Elbow Lake and its refusals to sell at wholesale violated the Sherman Act, and praying for a judgment restraining Otter Tail from refusing to deal, and for damages and other relief. United States District Court for the District of Minnesota, Civil No. 6-67-244.

On June 20, 1969, after discovery proceedings were virtually complete, the court continued the action "until the completion of administrative proceedings before the Federal Power Commission and of judicial review of its orders." Elbow Lake's Sherman Act action has remained in continued status since June 20, 1969.

The Federal Power Commission proceedings went forward, with the following results:

1. On November 6, 1968, the Commission ordered an interconnection for Otter Tail to sell power to Elbow Lake in emergency circumstances, when Elbow Lake's local generation facilities were unable to meet demand. This order did not require Otter Tail to sell wholesale power to Elbow Lake or to wheel power

for Elbow Lake's basic needs. It dealt only with emergency needs for power. **Village of Elbow Lake v. Otter Tail Power Co.**, 40 FPC 1262 (1968). This order was subsequently affirmed on appeal to the Court of Appeals for the Eighth Circuit. **Otter Tail Power Company v. Federal Power Commission**, 429 F. 2d 232 (8th Cir. 1970); **cert. denied** 401 U.S. 947.

2. On September 13, 1971, the Commission ordered that Otter Tail permit an interconnection with Elbow Lake, and to sell power to Elbow Lake at wholesale rates determined by the Commission. The Commission specifically determined "as a matter of law, we cannot compel Otter Tail to wheel Bureau of Reclamation power to Elbow Lake." **Village of Elbow Lake v. Otter Tail Power Co.**, ... FPC ... (1971), Opinion No. 603, FPC Docket No. E-7278 (A. 187). Otter Tail has appealed to the Court of Appeals for the Eighth Circuit, but has limited the scope of appeal to the rates provided by the Commission. That appeal is pending, as Case No. 72-1088.

Elbow Lake's need for electric power from sources other than its small local generators has been frustrated by Otter Tail's monopoly motivated refusal to sell power to Elbow Lake at wholesale and refusal to wheel power available from other generating sources. Finding No. 201, A. 101.

Otter Tail argues (Point I of its brief, pages 25-45) that its refusal to sell at wholesale is not subject to the Sherman Act, because "involuntary wholesale sales" of electricity are subject to Federal Power Commission jurisdiction under Section 202 (b) of the Federal Power Act.

Then, in a truly remarkable piece of logical legerdemain, Otter Tail argues (Point II of its brief, pages 46-64) that its refusal to wheel is also not subject to the Sherman Act, because wheeling is **not** subject to Federal Power

Commission jurisdiction under Section 202 (b) of the Federal Power Act.

By logical necessity, at least one of these propositions must be wrong. It cannot be that the same result, antitrust immunity, results from contrary causes, the enactment and non-enactment of a regulatory statute.

However, both propositions are wrong, as demonstrated below. First, Otter Tail's refusal to wholesale is subject to the Sherman Act, even though "involuntary wholesale sales" are also subject to the Federal Power Act. Second, and a fortiori, the Sherman Act applies to Otter Tail's refusal to wheel, because no legislation has been enacted affecting the same subject matter.

A. Otter Tail's Monopoly Motivated Refusals to Sell Power at Wholesale Are Subject to the Sherman Act, Even Though Wholesale Power Transactions Are Also Subject to the Federal Power Act.

1. Section 202 (b) of the Federal Power Act authorizes the Federal Power Commission to order a "public utility" to establish a physical interconnection of its transmission facilities with the facilities of another "person" engaged in the electric business, to sell or exchange energy with such persons. (As demonstrated, infra, pages 24-31, Section 202 (b) does not authorize the Federal Power Commission to compel interconnections for wheeling purposes.) An interconnection may be ordered if it is "necessary or appropriate in the public interest", and will not place an "undue burden" on the public utility, or "impair its ability to render adequate service to its customers"; likewise, the public utility need not enlarge its generating facilities for such purposes.

Otter Tail (and the Federal Power Commission in its brief *amicus*) suggest that this responsibility of the Federal Power Commission operates to relieve public utilities

of the proscriptions of the Sherman Act. They suggest that the Federal Power Act authorizes public utilities to engage in unilateral monopoly motivated refusals to deal, refusals to sell at wholesale, free of the sanctions of the Sherman Act.

Federal courts have, for years, been dealing with the problem of accommodating the Sherman Act, which proscribes monopolies and combinations in restraints of trade, with apparently conflicting regulatory laws.

The first principle is that "regulated industries are not per se exempt from the Sherman Act." **State of Georgia v. Pennsylvania Ry. Co.**, 324 U.S. 439, 456 (1945). An antitrust exemption may be expressly provided in a regulatory statute, see **McLean Trucking Co. v. United States**, 321 U.S. 67 (1944), but "immunity from the antitrust law is not lightly implied". **California v. Federal Power Commission**, 369 U.S. 482, 485 (1962); **United States v. Borden Co.**, 308 U.S. 188 (1938).

Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored because there is a "felt indispensable role of antitrust policy in the maintenance of a free economy." **United States v. Philadelphia National Bank**, 374 U.S. 321, 348 (1963).

Thus, the Sherman Act may be regarded as repealed pro tanto as to an industry only if subsequent regulatory legislation is so inconsistent that there is a "plain repugnancy between the antitrust and regulatory provisions." **United States v. Philadelphia National Bank**, 374 U.S. 321, 350-51. "Plain repugnancy" between the antitrust and regulatory provisions arises, and operates as an implied repeal of the antitrust law, only where the regulatory provisions reflect a "pervasive regulatory scheme" supplanting the antitrust laws insofar as a particular industry is concerned. **United States v. Philadelphia National Bank**, supra; **California v. Federal Power Commission**, supra.

For examples of particular regulatory laws as affecting the Sherman Act's application to particular industries, see **McLean Trucking Co. v. United States**, 321 U.S. 67 (1944); **California v. Federal Power Commission**, 369 U.S. 482 (1962); **Pan American World Airways v. United States**, 371 U.S. 296 (1963), and **United States v. Philadelphia National Bank**, 374 U.S. 321 (1963).

The **McLean Trucking** case affirmed the Interstate Commerce Commission's approval of a merger of several trucking companies, pursuant to the Interstate Commerce Act. Arguments that the merger violated the Sherman Act, and that the Commission could not authorize such a merger, were rejected, because specific provisions of the Act provided the Commission's authority to approve mergers "shall be exclusive and plenary" and carriers participating in approved transactions shall be "relieved from the anti-trust laws". The court recognized that the Interstate Commerce Act expressly immunizes the trucking industry from the antitrust laws, insofar as enumerated transactions are approved by the Commission.

In **California v. Federal Power Commission**, the court reversed the Federal Power Commission's approval of a merger of natural gas companies, pursuant to the Natural Gas Act. The Commission had proceeded despite the pendency of a Department of Justice action challenging the merger on a violation of the antitrust laws. The court reversed the Commission because it had presumed to decide antitrust issues, which were not within the Commission's authority. The court observed that the Natural Gas Act does not specifically provide antitrust exemption, as does the Interstate Commerce Act, nor was an implied repeal perceived.

The **Pan American World Airways** case was a civil action under the Sherman Act, challenging an agreed allocation of territories in the airline industry, a matter ordinarily within the rule that territorial allocations are

per se Sherman Act violations. However, the airlines' agreement under attack had been approved by the Civil Aeronautics Board, and was, because of such approval, specifically "relieved from the operations of the antitrust laws" by the Civil Aeronautics Act.

The last in this quartet of representative cases, **United States v. Philadelphia National Bank**, enjoined a proposed bank merger as violative of the anti-trust laws. The defense that the antitrust laws did not apply because the merger was subject to and approved by banking agencies was rejected. The court noted that no express antitrust immunity is conferred by the Bank Merger Act, nor was an immunity implied.

In the **Philadelphia National Bank** case the court illustrated "plain repugnancy", by contrasting the Bank Merger Act with the Civil Aeronautics Act, which was the subject of the **Pan American Airways** case. Similarly, in **California v. Federal Power Commission** the court compared the Natural Gas Act with the Interstate Commerce Act, the subject of the **McLean Trucking** case. The court noted that the Civil Aeronautics Act and the Interstate Commerce Act explicitly provide that transactions within the scope of those statutes and approved by the responsible agencies are immunized from the operation of the antitrust laws. By contrast, the Bank Merger Act and the Natural Gas Act do not provide immunity from the antitrust laws or authorize agencies to grant immunity from the antitrust laws. Thus, the transactions involved in the **Philadelphia National Bank** and **California v. Federal Power Commission** cases were held to be subject to the antitrust laws, the Sherman Act not having been repealed by the Bank Merger Act and Natural Gas Act.

The Federal Power Act is like the Bank Merger Act and the Natural Gas Act in that it is not "plainly repugnant" to the antitrust laws. It does not provide immunity from the antitrust laws, or authorize the Federal

Power Commission to grant immunity from the antitrust laws.

The Federal Power Act does not expressly exempt the electric industry from the Sherman Act, respecting conduct within or without the scope of the Federal Power Act. Nor can an exemption be implied insofar as Otter Tail's program of refusals to deal is concerned, because there is no repugnancy between the Federal Power Act and the Sherman Act. The Federal Power Act does not amount to a "pervasive regulatory scheme", operating to repeal the Sherman Act's application to the electric industry in general, or to Otter Tail's conduct designed to maintain its monopoly, in particular.

Part I of the Federal Power Act (16 U.S.C. 791-823) deals with the regulation and development of water power and resources, i.e. hydro generated electric power. Part II of the Act has several subjects, including 1) the promotion (but not the compulsion) of coordination of electric generation and transmission facilities (Section 202(a) of the Federal Power Act, 16 U.S.C. 824a (a)), 2) the compelled interconnection of transmission facilities in certain circumstances (not including interconnection for wheeling purposes, as demonstrated infra, pages 24-27) (Sections 202(b), 202(c), 202(d) of the Federal Power Act, 16 U.S.C. 824a (b), 824a (c), and 824a (d)), 3) regulation of property disposals, consolidations, and securities purchases and issuance (Sections 203 and 204 of the Federal Power Act, 16 U.S.C. 824b and 824c), and 4) the regulation of rates for transmission or sale of electric energy subject to the Act (Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d and 824e). Part III of the Act (16 U.S.C. 825-825d) deals with accounting and record keeping.

The Federal Power Act does not deal with the regulation and development of electric power generated by means other than water power on navigable streams. The Federal Power Commission has no control over the gen-

eration of electric power by such means as atomic energy or the burning of fossil fuels; it has no control over whether, where, or by whom such power generators shall be constructed. The Federal Power Act does not deal with wheeling (as demonstrated, infra, pages 30-31), and does not regulate the distribution of electric energy to retail consumers, or the terms of such service.

> "It is particularly significant to note, in the context of this antitrust action, that the Federal Power Act does not limit entry into the electric industry. Despite the Federal Power Commission's gratuitous remarks about 'ill-advised excursion into the electric power business' by municipal electric utilities (**Village of Elbow Lake v. Otter Tail Power Company**, ... FPC ... (1971), Opinion No. 603, FPC Docket No. E-7278. A. 187, 191), the Federal Power Act does not authorize the Commission to control entry into the electric business, or to approve conduct designed to foreclose market entry."

The Federal Power Act does not reach all aspects of the electric industry within the reach of commerce power of Congress. **Connecticut Light and Power Co. v. Federal Power Commission**, 324 U.S. 515, 530 (1945). The field covered by the Federal Power Act "is not coterminus with that covered by the Sherman Act." Cf. **United States v. Borden Co.**, 308 U.S. 188, 200 (1938). The Federal Power Act is not a pervasive regulatory scheme, occupying the whole electric field, and does not displace the Sherman Antitrust Act from applying to the electric industry.

The continuing vitality of the antitrust laws in the electric industry after enactment of the Federal Power Act is not only deducible from Supreme Court decisions dealing with other industries and other regulatory laws, it is a matter already decided by a Federal Court of Appeals.

In **Pennsylvania Water & Power Co. v. Consolidated G. E. L. & P. Co.**, 184 F. 2d 552 (4th Cir. 1950), **cert. den.**, 340 U.S. 906, Penn Water sought a declaratory judgment that a contract between it and Consolidated was void as a Sherman Act violation. The contract gave Consolidated a power to disapprove any sale, purchase or exchange of power, or plant expansion by Penn Water. The effect of the contract was to give Consolidated a power of territorial division and price fixing, thwarting potential competition between Penn Water and Consolidated. The court rejected a defense of exemption:

> ". . . The grant of monopolistic privileges subject to regulation by governmental body, does not carry an exemption, unless one be granted, from the antitrust laws, or deprive the courts of jurisdiction to enforce them." 184 F. 2d at 560.

See also **Pennsylvania Water and Power Co. v. Federal Power Commission**, 193 F. 2d 230 (D.C. Cir. 1951), **aff'd** 347 U.S. 414 (1952).

When all the cases and all the talk about plain repugnancy and implied repeals and antitrust immunity are digested, one finally must conclude that the "felt indispensable role of antitrust policy in the maintenance of a free economy," **United States v. Philadelphia National Bank**, 374 U.S. 321, 348 (1963), is so strongly felt that antitrust immunity should **never** be implied. Antitrust immunity should be accorded only by specific unmistakable statutory language, and not ever by implication.

The Federal Power Act does not expressly exempt the electric industry from the antitrust laws. An exemption should not be implied.

2. Since the regulatory provisions of the Federal Power Act does not amount to a pervasive regulatory scheme so as to supplant the Sherman Act, the operation of both laws upon the relevant transactions or occurrences is

appropriate. **United States v. Philadelphia National Bank**, 374 U.S. 321 (1963); **California v. Federal Power Commission**, 369 U.S. 482 (1962). Thus, Otter Tail is subject to both the Federal Power Commission's jurisdiction (under the Federal Power Act) to compel interconnections in the public interest and to Federal Courts' jurisdiction (under the Sherman Act) to enjoin monopoly motivated conduct.

It is especially fitting that both laws operate, since Otter Tail does not have any excuses sanctioned by the Federal Power Act for not interconnecting with Elbow Lake for the purpose of selling electricity at wholesale. Otter Tail's brief argues vehemently that the Court below ignored the Federal Power Act's interconnection criterion (Otter Tail's brief, pages 32-38). All these arguments ring hollow when one pauses to remember that not only the court below, but also the Federal Power Commission, **Village of Elbow Lake v. Otter Tail Power Co.**, ... FPC ... (1971) FPC Docket No. E-7278, have concluded that Otter Tail has no legal excuse, under either the Sherman Act or the Federal Power Act, for its refusals to sell power to Elbow Lake at wholesale. On the contary, Otter Tail has been almost candid in admitting its refusals to deal are motivated only by a desire to maintain its monopoly position in the electric business. Answer, Paragraph II, A. 18; A. 682-83, 703-05, 804-06. Otter Tail has not claimed that the Federal Power Act excused Otter Tail's refusals to sell power at wholesale on grounds that compliance with the requests would require an enlargement of generating facilities, impose an undue burden, or impair service to existing customers.

Otter Tail's refusals to wholesale have been found to be monopoly motivated (Conclusion of Law IV, A. 129-30) and such conduct has been enjoined (Judgment, Paragraph IV, A. 132, 208), subject to retention of jurisdiction. If Otter Tail, after complying with the injunction, should

ever believe that it has valid reasons to terminate wholesaling or wheeling (for example, if service to other customers is impaired), that will be time enough for it to apply for appropriate relief from the injunction.

3. Otter Tail argues that the "public interest" criterion of Section 202(b) Federal Power Act permits the maintenance of monopoly, and that the Federal Power Commission should decide the "public interest" issue. (Otter Tail brief, pp. 34-35; 38-41.) This position is also taken by the Federal Power Commission in its brief *amicus* (p. 19). Cases cited in support of this position include **Federal Maritime Commission v. Aktiegolaget Svenska Amerika Linien,** 390 U.S. 238; **Seaboard Airline R. R. v. United States,** 382 U.S. 154; **Pan American World Airways, Inc. v. United States,** 371 U.S. 296; and **McLean Trucking Co. v. United States,** 321 U.S. 67. All of these cases dealt with practices which would ordinarily be antitrust violations, but which were approved by agencies and therefore immunized from antitrust laws by specific statutory provision. By contrast, there is no specific provision in the Federal Power Act that the Federal Power Commission can grant antitrust immunity.

The "public interest" does not allow the maintenance of a monopoly in the absence of specific legislation to that effect.

4. This action does not present a conflict between the jurisdiction of Federal Courts and the Federal Power Commission. Rather, it demonstrates that the two are not in conflict, but are "complementary". **California v. Federal Power Commission,** 369 U.S. 482, 490 (1963); **Northern Natural Gas Co. v. Federal Power Commission,** 309 F. 2d 953, 959-961 (D.C. Cir. 1968).

The Federal Power Act and the Sherman Act have a common purpose; both are ultimately concerned with the most efficient allocation of resources, for the maximiza-

tion of the common good. Though they may superficially appear to be conflicting or overlapping, analysis demonstrates their common goal. **Northern Natural Gas Co. v. Federal Power Commission**, supra.

Both the Federal Power Act and the Sherman affect refusals to sell electric power at wholesale. The Federal Power Commission may order interconnection and wholesale sales in the "public interest". The Sherman Act requires that refusals to sell at wholesale will not be tolerated where the motive for such conduct is to maintain a monopoly.

The two laws are not contradictory in affecting the same subject; they are complementary.

The court below recognized the complementary relationship of the Sherman Act and the Federal Power Act. The judgment requires that Otter Tail refrain from its monopoly motivated conduct, including its refusals to sell power at wholesale. This part of the judgment is an exercise of the court's jurisdiction to enforce the Sherman Act, to enjoin monopoly motivated conduct; it is an exercise of jurisdiction vested in the court, and not in the Federal Power Commission. The judgment provides that the rates for wholesale sales shall be filed with and approved by the Federal Power Commission. Amended Judgment, Par. V, A. 209.

The judgment recognizes the complementary relationship of the two acts, by an exercise of the court's jurisdiction to enjoin monopolistic practices and a careful avoidance of judicial interference with the Federal Power Commission's jurisdiction over wholesale rates.

5. Section 202 (b) of the Federal Power Act is also urged as the basis for a primary jurisdiction argument. Otter Tail urges (and the Federal Power Commission repeats in its brief *amicus*) that only the Commission, and

not a federal court, may compel Otter Tail to sell power at wholesale. (Otter Tail brief, pp. 26-31; FPC brief, pp. 10-24).

These arguments lose sight of the fact that this action is a monopoly action, in which Otter Tail has been found to have monopolized the electric business in the relevant market by several kinds of conduct: 1) refusals to sell power at wholesale; 2) refusals to wheel power; 3) litigation; 4) invocation of restrictive contracts. Conclusions of Law, A. 130. Only one of these practices, refusal to sell power at wholesale, is arguably an appropriate subject of Federal Power Commission jurisdiction. But all of these are integral parts of a single program designed to perpetuate Otter Tail's monopoly.

It is sometimes a difficult problem for a federal court to resolve whether it should proceed in an action where there is concurrent jurisdiction in an administrative agency. But where the agency does not have jurisdiction over the entire set of operative facts, the federal court should proceed, in order that complete justice may be done. Since the Federal Power Commission is not competent to consider and remedy Otter Tail's refusals to wheel, its spurious litigation, and its restrictive contracts, or to dismantle Otter Tail's program of monopoly maintenance, the District Court properly proceeded to decide that Otter Tail's entire program of monopoly maintenance, including its refusals to sell electric power at wholesale, violated the Sherman Act, and to decree an end to Otter Tail's monopoly maintenance practices.

Primary jurisdiction arguments are virtually equivalent with arguments that an antitrust exemption is implied by regulatory laws. As demonstrated above, at pages 15-22, the Federal Power Act does not imply a repeal of the Sherman Act. Rather, the two laws are complementary. In these circumstances, it is inappropriate to ap-

ply primary jurisdiction concepts to attenuate courts' jurisdiction to enforce the antitrust laws. **United States v. Philadelphia National Bank**, 374 U.S. 321, 353-54 (1963).

B. **Otter Tail's monopoly motivated refusals to deal by refusing to wheel are not excused by the Federal Power Act because the Federal Power Act does not affect wheeling arrangements.**

1. It has been held, on the basis of the language of Section 202(b) of the Federal Power Act, and on the basis of explicit legislative history, that the obligation to "wheel" power, like a common carrier, is not imposed by the Federal Power Act. See **City of Paris, Ky. v. Kentucky Utilities Co.**, 41 FPC 45 (1969); **Village of Elbow Lake, Minn. v. Otter Tail Power Co.**, ... FPC ... (1971), Opinion No. 603, FPC Docket No. E-7278; (". . . as a matter of law, we cannot compel Otter Tail to wheel Bureau of Reclamation power to Elbow Lake.") A. 187, 193-94. Legislative history supporting these decisions is set forth in Otter Tail's brief (pages 48-53) and addendum (pages 1-28), and need not be reproduced here.

There is apparent agreement among all, Otter Tail, Elbow Lake, the Justice Department and the Federal Power Commission, that the Federal Power Act does not confer upon the Commission the authority to compel wheeling.

Thus, the practical problem with Otter Tail's assertion, that the Federal Power Act forecloses application of the Sherman Act to Otter Tail's refusal to wheel, is that wheeling would be foreclosed as an alternative source of power to Elbow Lake. The Federal Power Commission is unable to compel wheeling under the Federal Power Act. Otter Tail contends that its refusal to deal, its refusal to wheel, is exempt not only from the Federal Power Act, but also from the Sherman Act.

Acceptance of that claim would amount to approval of a private, unilateral refusal to deal with a purpose to

maintain a monopoly, and would be contrary to all the refusal to deal cases (Part I, pages 8-12, above).

Otter Tail makes the curious argument, a classic non-sequitur, that the Congressional exclusion of wheeling from the scope of the Federal Power Act is to be interpreted as the equivalent of a legislative amendment to the Sherman Act, immunizing electric utilities from proscriptions against monopolizing by the device of refusing to wheel.

Otter Tail's argument can be paraphrased in this way: 1) Application of the Sherman Act to the electric industry is limited by the Federal Power Act; 2) the Federal Power Act grants the Federal Power Commission jurisdiction over some aspects of the electric business, including authority to compel physical interconnections between electric power suppliers, in some circumstances, but the Act does not grant the jurisdiction to compel wheeling; 3) therefore (the non-sequitur), because a refusal to wheel is outside the scope of the Federal Power Act, it is also outside the scope of the Sherman Act, even if the refusal to wheel is motivated by a purpose to maintain a monopoly.

It might be arguable that the enactment of a regulatory law repeals pro tanto the antitrust laws. (That subject is covered at pages 26-28, above.) But it does not follow from the non-enactment of a regulatory law that the antitrust laws are repealed. Nonaction signifies nothing.

Against the long-standing background of prior anomolous decisions that baseball was not subject to the Sherman Act, the failure of the Congress to enact remedial legislation was seen in **Flood v. Kuhn**, 40 U.S.L.W. 4747 (1972), as the equivalent of Congressional approval of baseball's unique exemption from antitrust laws. But the unique circumstances in **Flood v. Kuhn** cannot be extended to this case, to fabricate an antitrust exemption for the electric industry. The basic ingredient is missing. There

is no prior Supreme Court decision that the electric industry is exempt from the antitrust laws. Legislative nonaction is significant only against a background of a prior court decision.

Congressional nonaction to impose wheeling requirements under the Federal Power Act does not operate to amend the Sherman Act. Congressional nonaction is not the legal equivalent of affirmative enactment.

2. It is axiomatic that transactions in a regulated industry can be immune from the antitrust laws only where an authorized agency has approved the transaction. **Pan American World Airways, Inc. v. United States**, 371 U.S. 296, 304-06 (1963); **State of Georgia v. Pennsylvania Ry. Co.**, 324 U.S. 439, 456-57 (1945).

Regulated industries might be exempt from the Sherman Act, **if** they are regulated; they are not free to engage in unregulated monopolistic conduct. They are not free of **both** the Sherman Act and regulatory laws. **United States v. Borden Co.**, 308 U.S. 188 (1938).

But that novel notion is precisely what Otter Tail contends here. It seeks to avoid Sherman Act sanctions for its refusal to deal, while acknowledging the Federal Power Commission's lack of authority to deal with wheeling.

It just plain doesn't work that way. The antitrust laws apply in a regulated industry to situations "with which the regulatory commission is powerless to deal". **Pennsylvania Water & Power Co. v. Federal Power Commission**, 192 F. 2d 230, 236 (D. C. Cir. 1951); **aff'd**, 347 U.S. 414 (1952).

See also the related case,[2] **Pennsylvania Water and Power Co. v. Consolidated G.E.L. & P. Co.**, 184 F. 2d

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[2] The two cases are a couple chapters in a history of litigation. In the Fourth Circuit case, a private restrictive agreement was declared to be in violation of the Sherman Act. In the D.C. Circuit case, the court affirmed a FPC order requiring

552 (4th Cir. 1950), cert. denied, 340 U.S. 906. The 4th Circuit Court observed:

> ". . . the control of the Federal Power Commission over the power sites of the country and over the interstate transmission of electric energy is not disturbed by the retention of the jurisdiction of the courts to enforce the anti-trust acts." 184 F. 2d at 564.

Since the Federal Power Commission is "powerless to deal" with wheeling, the antitrust laws do apply to Otter Tail's monopoly motivated refusal to wheel.

Indeed, even in industries where antitrust immunity is expressly conferred by regulatory statute, the immunity extends only to conduct and transactions within the agency's purview and sanctioned by the agency, not into areas beyond the agency's authority. See **Pan American World Airways v. United States**, 371 U.S. 296 (1963); **Georgia v. Pennsylvania R. Co.**, 324 U.S. 439 (1945); **United States v. Borden Co.**, 308 U.S. 188 (1938). For example, the defendants in the **Borden** case were held answerable under the Sherman Act, because the transactions alleged as violations were not approved by the Secretary of Agriculture.

A fortiori, the Sherman Act applies to refusals to wheel in the electric industry. The Federal Power Act not only withholds wheeling from the Federal Power Commission's range of authority, but also does not confer upon the

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the continuation of service at reduced rates, even though the service had been initially commenced pursuant to the restrictive contract. These cases illustrate complementary jurisdiction of the Federal Power Act and the Sherman Act. The Sherman Act was applied, to outlaw private restrictive conduct. The Federal Power Act was also applied, requiring Penn Water to do some of the things it used to do under the restrictive contract, but that did not "legalize" the restrictive contract, 347 U.S. 414, 421-2. Likewise, the Federal Power Act does not operate to "legalize" Otter Tail's refusals to deal and its other monopolistic conduct.

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Commission any authority to immunize any conduct from the requirements of the Sherman Act.

A transaction's sanction by a regulatory agency does not always confer antitrust immunity. See, e.g., **United States v. Philadelphia National Bank**, 374 U.S. 321 (1963), and **California v. Federal Power Commission**, 369 U.S. 482 (1962). But a transaction in a regulated industry is never relieved of the requirements of the antitrust laws unless it is approved by the regulatory agency. **Pan American World Airways v. United States**, supra; **Georgia v. Pennsylvania R. Co.**, supra.

Otter Tail's refusals to wheel have not been and cannot be approved by the Federal Power Commission, and so cannot be immune from the antitrust laws.

As demonstrated above, at pages 15-21, the Federal Power Act is not a "pervasive regulatory scheme" which pre-empts the governance of the electric industry, to the exclusion of the Sherman Act. Quite the contrary, the Sherman Act does apply to refusals to wheel in the electric industry, because the Federal Power Act does not authorize refusals to wheel or provide for immunity from the antitrust laws.

In **Pennsylvania Water & Power Co. v. FPC**, 193 F. 2d 230 (D.C. Cir. 1951), **aff'd**, 343 U.S. 414 (1952), the court observed that the Federal Power Act, by establishing a regulatory scheme for dealing with public utilities, superseded the antitrust laws, "**to the extent** of the repugnancy between them." 193 F. 2d at 235, (emphasis in the original). Although the court was dealing with an arrangement ordered by the Commission and therefore not subject to the Sherman Act, the court recognized that private conduct in the electric industry continues to be subject to the Sherman Act:

> ". . . Thus, Congress or the states may authorize arrangements among producers even though such

action without governmental sanction and enforcement would violate the antitrust laws. Similarly, states may authorize monopolies and Congress may substitute direct price fixing by a public agency for competition. But when the practice complained of is not protected by legislative sanction, either directly or by being committed to a commission empowered to deal with it, the antitrust laws have been relied upon as a minimal means of protecting the public interest." ". . . The antitrust laws have been the means of assuring that such initiative remains unchecked by conspiracies or other illegal arrangements with which the regulatory commission is powerless to deal." 193 F. 2d at 235-36.

The Sherman Act can be applied to enjoin refusals to wheel when the purpose is to maintain monopoly, without injury to the Federal Power Commission's administration of the Federal Power Act, because the Commission is "powerless to deal" with that kind of illegal, monopoly motivated arrangement. Indeed, the Sherman Act must be applied, "as a minimal means of protecting the public interest."

There is no conflict between the Federal Power Act and the Sherman Act operating to repeal the Sherman Act's application to Otter Tail's refusals to wheel, for the fundamental and uncomplicated reason that the Federal Power Act does not apply. The Sherman Act applies, and proscribes Otter Tail's monopoly motivated refusals to wheel.

C. **The Federal Power Act does not condone monopoly.**

1. Otter Tail quotes "the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and consumption of natural resources" (Otter Tail's brief, pp. 35 and 40), a purpose

declared in Section 202(a) of the Federal Power Act (16 USC 824a (a)). Otter Tail translates this language as a purpose of the entire Part II of the Federal Power Act. This extended translation is further interpreted by Otter Tail as justifying monopolistic conduct.

Section 202(a) does not condone private monopolistic conduct "for the purpose of assuring an abundant supply of electricity . . ." All Section 202(a) does is to empower and direct the Federal Power Commission "to divide the country into regional districts" and to "promote and encourage" the "voluntary interconnection and coordination of facilities for the generation, transmission and sale of electric energy." The congressional assignment of a promotional responsibility in the Federal Power Commission, cannot, by any stretch of imagination, be interpreted as congressional license for public utilities, such as Otter Tail, to unilaterally engage in monopolistic conduct.

Section 202(a) does not confer any obligations upon public utilities. Under Section 202(a), public utilities are only objects of promotional efforts by the Federal Power Commission to engage in "voluntary interconnection and coordination of facilities." Therefore, Section 202(a) cannot be regarded as a regulatory provision supplanting the Sherman Act, because section 202(a) does not accomplish any regulation at all.

Section 202(a) does not operate to exempt Otter Tail from the jurisdiction of the Sherman Act. The contrary is true: Otter Tail's conduct concerning "voluntary interconnection and coordination of facilities" is subject to the Sherman Act.

Otter Tail has its initiative in determining whether it will make arrangements for the "voluntary interconnection and coordination of facilities", but ". . . the antitrust law has been the means of insuring that such initiative remains unchecked by conspiracies and other illegal arrangements with which the commission is powerless to

deal." **Pennsylvania Water and Power Co. v. Federal Power Commission**, 193 F. 2d 230, 236 (D.C. Cir. 1951), **aff'd.** 347 U.S. 414 (1952). See also **State of Georgia v. Pennsylvania R. Co.**, 324 U.S. 439 (1952). Otter Tail's monopoly motivated refusals to deal, its voluntary conduct to maintain its monopoly is an "illegal arrangement" which is subject to the Sherman Act.

2. It is important to keep in mind what this case is not. This case is not a Federal Power Act case.

Much of Otter Tail's argument is a claim that the lower court has required Otter Tail to do things the Federal Power Commission could not require under the Federal Power Act. But this case is not a Federal Power Act case. It is a Sherman Act case, concerned with Otter Tail's conduct to establish and maintain a monopoly, conduct prohibited by Section 2 of the Sherman Act, conduct not within the scope of the Federal Power Commission's authority, conduct not immunized from the Sherman Act by the Federal Power Act.

As a Section 2 Sherman Act case, the District Court decision and judgment do not impose on Otter Tail an "absolute duty" to sell power at wholesale or to wheel power "in all cases, regardless of the circumstances", nor is "common carrier status" imposed on Otter Tail (Otter Tail brief, pages 22 and 57). These statements and the related "questions presented" (as formulated in Otter Tail's brief, page 4) cavalierly ignore the fundamental nature of this Section 2 Sherman Act case. They seek to divert attention from the monopoly and monopolizing issues.

This appeal does not present for review an unqualified ruling that the Sherman Act imposes on an electric utility "common carrier" status or an "absolute duty" to sell at wholesale or to wheel upon demand, "regardless of circumstances".

The circumstances here are monopoly.

In these monopoly circumstances, the decision and judgment of the District Court were correct. The decision on this appeal should reconfirm that monopoly motivated conduct is unlawful, and should reconfirm that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor is unlawful". **United States v. Griffith**, 334 U.S. 100, 107 (1948).

Otter Tail's refusal to deal, its refusal to wheel, its refusal to wholesale are monopoly motivated. The Federal Power Act does not exempt the electric industry from the antitrust principle that a refusal to deal, with a purpose to create or maintain a monopoly, is a violation of the Sherman Act.

POINT III

Otter Tail's Restrictive Contracts Are Designed to Maintain Its Monopoly, Therefore, They Are Not Reasonable Ancillary Restraints.

The District Court found that restrictive provisions in Otter Tail's transmission contracts are "in reality, territorial allocation schemes." Decision, A. 43.

Otter Tail suggests that its restrictive provisions are valid ancillary restraints, subject to the "rule of reason", and not to "per se" rules of illegality.

Otter Tail's reliance on the rule of reason is misplaced, for two reasons.

First, the rule of reason is applied to judge the effects of the restraint on competition. **United States v. Trenton Potteries Co.**, 273 U.S. 392 (1927); **Board of Trade v. United States**, 246 U.S. 231 (1918). If the effects of the purported reasonable restraint are adverse to competition, the restraint is not reasonable, and is therefore unlawful.

The reasonableness of the restraint from the selfish point of view of the beneficiary of the restraint is not relevant.

> "The anti-trust outcome does not turn merely on the presence of sound business reason or motive. Here, for example, if the test of reasonableness were merely whether Schwinn's restrictive distribution program and practices were adopted 'for good business reasons' and not merely to injure competitors, or if the answer turned upon whether it was indeed 'good business practice', we should not quarrel with Schwinn's eloquent submission or the finding of the trial court. But our inquiry cannot stop at that point. Our inquiry is whether, assuming nonpredatory motives and business purposes and the incentive of profit and volume considerations the effect upon competition in the marketplace is substantially adverse. The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct. It is only if the conduct is not unlawful in its impact in the marketplace or if the self-interest coincides with the statutory concern with the preservation and promotion of competition that protection is achieved." **United States v. Arnold, Schwinn & Co.**, 388 U.S. 365, 375 (1967).

Otter Tail's only alleged reasonable basis for its restrictive contracts is the protection of its business, that is, the maintenance of a monopoly. That is an unlawful purpose and is not protected by the "rule of reason" or the doctrine of "ancillary restraints", because the purpose is the antithesis of competition. When the supposed reasonable restraint is in fact monopolistic, it is a violation. **United States v. Addyston Pipe and Steel Co.**, 175 U.S. 211 (1899).

The second point is that the "rule of reason" operates only to sustain reasonable contracts, combinations, etc., which might be attacked under Section 1 of the Sherman

Act. There is no rule of reason protecting monopolizing; the rule of reason has been formulated to test the legality of contracts, combinations, etc., under Section 1, not the legality of monopolizing under Section 2. See **Standard Oil Co. v. United States**, 221 U.S. 1 (1911); **Board of Trade v. United States**, supra, and **United States v. Aluminum Co. of America**, 148 F. 2d 416, 427 (2d Cir. 1945) ("It (Congress) did not condone 'good trusts' and condemn 'bad' ones; it forbad all.").

The Court concluded that Otter Tail has violated Section 2 of the Sherman Act by monopolizing and attempting to monopolize the electric distribution business. A. 129-130. One of its monopolistic tactics has been restrictive contracting. A. 130.

Monopolization is never excusable as "reasonable".

POINT IV

So-Called "Natural Monopoly" Characteristics of the Electric Industry Do Not Create a Legal Right for Otter Tail to Use Illegal Means to Perpetuate Its Monopoly.

Otter Tail claims that "special circumstances of the electric utility industry" relieve it of the obligations of the Sherman Act (Otter Tail brief, page 6 (question 6); pp. 69-83).

Tacitly acknowledging the lack of legal justification for its predatory conduct, Otter Tail has fabricated a sort of "natural law" defense. It claims that "special circumstances," that so-called "natural monopoly" characteristics of utility businesses, excuse it from complying with the Sherman Act (Otter Tail brief, p. 81).

The argument seems to be that electric power distribution in any community tends to be a "natural monopoly." There cannot, as a practical matter, be any workable competition within a community between suppliers. There-

fore, the argument goes, antitrust concepts cannot apply, since there is no competition being foreclosed, and the existing monopolist is therefore free to use any means to preserve its monopoly market from being taken over by another monopolist.

There are at least 5 rejoinders to this argument.

1. The first is so apparent that it is easily overlooked: "Even natural monopoly industries experience some competition among members for the right to be the natural monopolist of a new market. . . ."[3] Similarly, competition for the right to be the natural monopolist is not limited to new markets, but may involve a new entrant seeking to replace an entrenched monopoly. See **Union Leader Corp. v. Newspapers of New England, Inc.**, 180 F. Supp. 125 (D. Mass. 1960), 284 F. 2d 582 (1st Cir. 1960), **cert. denied** 365 U.S. 833.

The circumstances of the electric distribution business may foreclose freedom of individual consumers within a community to choose among electric suppliers; generally the choice must be made by the community of consumers as a unit. Frequently the competition between electric power suppliers is not competition for individual consumers, but for communities. The manner in which organized communities make their choices between private or municipally owned electric suppliers is the election process. Finding No. 189, A. 89.

Thus, the "natural monopoly" of the single electric distributor in a community at any point in time is not necessarily a perpetual monopoly; it should be subject to competition to determine who will be the "natural monopolist."

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[3] Address by Edwin M. Zimmerman, Anti-trust Division, Dept. of Justice, **The Relationship of Regulation to Antitrust Enforcement**, American Bar Association Annual Meeting, 1966, Public Utility Section; published in **Public Utilities Fortnightly**, Sept. 15, 1966.

This is one form competition should take in the electric distribution industry; it is the essence of competition—the freedom to choose among supplier. The facts that such choices are made by communities, rather than by individuals, and by formal election rather than informal selection, do not change their character as choices which should be made in a competitive situation.

The kind of competition here described is the real arena of competition between public and private power. This public vs. private power competition (so often only debated) ought to be subject to the test of the marketplace—competition—which is the test sanctioned by national policy in the Sherman Act.

Several towns served at retail by Otter Tail have held elections on the question of establishing municipal systems. Finding No. 180. Elbow Lake and other communities have, in this arena of competition between public and private power, voted for public power, municipally owned. Otter Tail, the "natural" monopolist rejected in the election, by manipulating its monopoly control of transmission facilities, has sought to frustrate those decisions so that the communities of consumers will have no choice, and will be forced to do business with Otter Tail. That conduct, designed to maintain Otter Tail's existing monopoly of the local electric distribution markets, is illegal monopolizing, since there would otherwise be competition, i.e. the opportunity to make an effective alternative choice to operate municipal utilities.

The current monopolist in a "natural monopoly" market may respond to the challenges of a prospective new entrant, but it has no special license to engage in illegal conduct. **Union Leader v. Newspapers of New England, Inc.**, 180 F. Supp. 125 (D. Mass. 1960); 284 F. 2d 582 (1st Cir. 1960), **cert. denied**, 365 U.S. 833. It may not use its monopoly power to foreclose competition. **United States v. Griffith**, 334 U.S. 100 (1948).

2. The circumstances that the electric utility industry tends to be naturally monopolistic, as a matter of economics, does not, as a matter of law, confer upon any of the contestants for that position the right to use unlawful means to vest the monopoly in themselves. **Union Leader Corp. v. Newspapers of New England, Inc.**, 180 F. Supp. 125 (D. Mass. 1960), 284 F. 2d 582 (1st Cir. 1960), **cert. denied**, 365 U.S. 833.

3. An argument from the major premise that an industry tends to monopoly to the conclusion that it should be free of the requirements of the antitrust laws goes off in exactly the wrong direction. It seems far more appropriate that a monopoly industry be subject to the antitrust laws precisely because it is a monopoly industry, for only by subjecting monopoly industries to laws against monopolizing can our society's economy be protected from abuse of monopoly power. Cf. **United States v. Philadelphia National Bank**, 374 U.S. 321, 352 (1963).

Monopoly domination of such a necessity of modern life as electricity should be tempered by application of the Sherman Act, to prevent abuse of private control over that essential industry.

4. In the electric industry, there is another form of competition, commonly called the "yardstick". The "yardstick" is the performance of one type of electric supplier, such as a municipal system, compared to the performance of a privately owned electric utility, as a measure of the prices charged and services provided by each.

> ". . . the only way in which a degree of competition with its salutary effect on prices can be injected into electric power is through the indirect competition and example offered by the customer-controlled power systems." (U.S. Senator) Metcalfe and Reinemer, **Overcharge** (1963), p. 241.

5. The preservation of competition is not the only goal of the antitrust laws. See **United States v. Aluminum Company of America**, 148 F. 2d 416 (2d Cir. 1945). One of its purposes is to keep the channels of commerce open to new entrants. **Klor's, Inc. v. Broadway-Hale Stores, Inc.**, 359 U.S. 207 (1959); **North Texas Producers Ass'n. v. Young**, 308 F. 2d 235 (5th Cir. 1962), **cert. denied**, 372 U.S. 929. See also **Continental Ore Co. v. Union Carbide and Carbon Corp.**, 370 U.S. 690 (1962); and **Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.**, 364 U.S. 656 (1961).

Otter Tail's conduct in blocking the flow of electric power to infant municipal utilities can scarcely be viewed as consistent with "open channels" and "freedom of entry" policies. Quite the contrary, conduct designed to foreclose market entry is a per se violation of the antitrust laws. **International Salt Co. v. United States**, 328 U.S. 392 (1947).

Otter Tail's claim of a right to use monopolistic tactics in resisting entry into the electric business by municipal utilities is similar to the claim made by Alabama Power Company in 1938, when it challenged the emergence of new municipal electric systems.

> "The injury which petitioner will suffer, it is contended, is the loss of its business as a result of the use of the loans and grants by the municipalities in setting up and maintaining rival and competing plants. . . ."
>
> . . . .
>
> "The claim that petitioner will be injured, perhaps ruined, by the competition of the municipalities brought about by the use of the moneys, therefore, presents a clear case of damnum absque injuria. Stated in other words, these municipalities have the

right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If this business be curtailed or destroyed by the operation of municipalities, it will be by lawful competition from which no legal wrong results.

"What petitioner anticipates, we emphasize, is damage to something they do not possess—namely, a right to be immune from lawful municipal competition. No other claim of right is involved." **Alabama Power Company v. Ickes**, 302 U.S. 464, 475, 480 (1938).

See also **Tennessee Electric Power Co. v. Tennessee Valley Authority**, 306 U.S. 118 (1939).

In short, the contemporary monopolist in any "natural monopoly" market does not have a legal right for his monopoly to be perpetuated.

Otter Tail's claim that the electric industry has some "natural law" exemption from the Sherman Act may be likened to a similar claim made for the insurance industry in **United States v. South-Eastern Underwriters Ass'n.**, 322 U.S. 533 (1944), and should be likewise rejected.

"Whether competition is a good thing for the insurance business is not for us to consider. Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from the Congress, not this Court." 322 U.S. at 561.

Congress has rejected proposed exemptions of the electric industry from the Sherman Act. See, e.g. S. 683, 90th Cong. 1st Sess. (1967); S 3136, 89th Cong. 2d Sess. (1966). Against this background, an electric industry exemption cannot be implied. **State of Georgia v. Pennsylvania R. Co.**, 324 U.S. 439, 457 (1945).

The electric industry is subject to the Sherman Act, just like the tobacco industry, just like the shoe industry, just like any other industry that does not have a specific congressional exception.

It has been observed that not just money profits, but also a quiet life, is a monopolist's advantage. Judge Hand expressed that notion this way:

> "Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone." **United States v. Aluminum Company of America**, 148 F. 2d 416, 427 (2d Cir. 1945).

(The Supreme Court quoted and "endorsed" this statement in **American Tobacco Co. v. United States**, 328 U.S. 781, 813 (1946).)

Otter Tail's "special circumstances" defense appears to be an expression of self doubt, doubt whether it can awaken from its quiet life and respond to the stress of competition, doubt whether it can shake its narcotic addiction to immunity from competition, doubt whether it can do business as others do, competitively. That is a problem for Otter Tail's management to deal with, not for courts to accept as justification for illegal conduct.

Otter Tail's response to the competition presented by municipal electric utilities must be carried on within, not outside, the rules of business conduct embodied in the Sherman Act. **United States v. Arnold, Schwinn and Co.**, 388 U.S. 365 (1967).

CONCLUSION

For the reasons and upon the authority set forth above, the decision and judgment of the District Court should be affirmed.

Respectfully submitted

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No. 71-991

In the Supreme Court of the United States
October Term, 1971
(Title Omitted in Printing)

CONSENT TO FILING OF BRIEF AMICUS CURIAE

The United States of America, one of the parties to this appeal, hereby consents to the filing of a brief amicus curiae by the Village of Elbow Lake, a Minnesota political subdivision, in support of the United States.

Dated this 15th day of June, 1972.

/s/ ERWIN N. GRISWOLD
Solicitor General of the
United States

No. 71-991

In the Supreme Court of the United States
October Term, 1971
(Title Omitted in Printing)

CONSENT TO FILING OF BRIEF AMICUS CURIAE

Otter Tail Power Company, one of the parties to this appeal, hereby consents to the filing of a brief amicus curiae by the Village of Elbow Lake, a Minnesota political subdivision, in support of the United States.

Dated this 23rd day of June, 1972.

FIELD, ARVESEN, DONOHO, LUNDEEN
and HOFF
By /s/ CYRUS A. FIELD
One of the Attorneys for
Otter Tail Power Company

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-991

OTTER TAIL POWER COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the District of Minnesota

BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION AS AMICUS CURIAE

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IN THE

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OCTOBER TERM, 1972

No. 71-991

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UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the District of Minnesota

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BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The Appellant and the Appellee have consented to the filing of this brief by American Public Power Association as Amicus Curiae. This brief supports the decision below, which we believe essential to ensure the continued existence of a competitive electric utility industry in the interest of the ultimate consumers of the Nation's electric power.

American Public Power Association (APPA) is a national service organization representing and serving local consumer-owned utilities. The membership of APPA consists of utilities owned by political subdivisions of states, such as municipalities and districts, and utilities which are cooperatively owned. In 1971 there were over 2,900 consumer-owned electric utilities in 49 states and the territories of the Virgin Islands, Puerto Rico, and Guam. Consumer-owned utilities accounted for about 11.9 percent of the country's installed generating capacity and served about 22.2 percent of the Nation's power customers.

Most consumer-owned utilities are dependent upon interconnections with federally and privately owned utilities to furnish a substantial part of the generating capacity required to satisfy the needs of their customers.

QUESTION PRESENTED

The question presented, in our view, is this:

Does Section 202(b) of the Federal Power Act, which authorizes the Federal Power Commission to compel interconnections between utilities (but which the Commission construes as not authorizing it to compel the transmission ("wheeling") of power to a municipality from another generating source over such an interconnection), preclude a federal court from enjoining a utility's refusal to "wheel" via an interconnection ordered by the Commission, in circumstances which would constitute a violation of Section 2 of the Sherman Act by that utility in the misuse of its monopoly, absent the asserted shield of the Federal Power Act?

STATEMENT OF THE CASE

Certain municipalities to which Congress has granted a preference in the purchase of power disposed of by the U.S. Bureau of Reclamation from government-owned hydroelectric plants in the Missouri River Basin,[1] have been unable to exercise that preference because the only transmission lines which connect them with United States power plants are owned by the Otter Tail Power Company. While Otter Tail, by contract with the Bureau of Reclamation, purchases power from those government plants and takes it into its transmission system, and while this transmission system extends to these towns (and Otter Tail has physically supplied power to customers in those towns in the past), Otter Tail refuses to transmit government-generated power to them as customers of the United States, thus denying these municipalities the benefit of the low-cost federal power to which the federal statutes give them a preference.[2] The ground of the refusal is a company policy against selling power at wholesale,

[1] The preference statutes directly applicable here are Sec. 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s, and the Reclamation Project Act of 1939, 43 U.S.C. § 485h. Other statutes articulating this policy are: Town Sites Act, 43 U.S.C. § 522; Federal Power Act, 16 U.S.C. § 800; Sale of Power on Salt River Project, 43 U.S.C. § 598; Boulder Canyon Project Act, 43 U.S.C. § 617d(c); Tennessee Valley Authority Act, 16 U.S.C. §§831i, j; Fort Peck Project Act, 16 U.S.C. § 833c; Rural Electrification Act, 7 U.S.C. § 904; Bonneville Project Act, 16 U.S.C. § 832c; Water Conservation and Utilization Act, 16 U.S.C. § 590z-7; Small Reclamation Project Act of 1956, 43 U.S.C. §§ 422a-*1*; Niagara Power Project Act, 16 U.S.C. § 836(b)(1); Atomic Energy Act of 1954, 42 U.S.C. § 2064; Flood Control Act of 1958, § 203, 72 Stat. 311; Flood Control Act of 1962, § 204(b), 76 Stat. 1193.

[2] The company's complete dominance in transmission is spelled out in the court's findings. A. 91-101. ("A." references are to the Appendix filed with Appellant's Brief.)

or wheeling power from other suppliers, to a former retail customer of the company.

Indeed, Otter Tail, to nail down its monopoly control of this federal power, succeeded in getting the Bureau of Reclamation to put into a contract, by which the Bureau sells the company large quantities of power, a clause which specifically excuses Otter Tail from transmitting government power to municipalities which received retail service from Otter Tail prior to that contract's date (1955).[3]

The court's findings show this:

There are 14 interconnections between Otter Tail's electric system and that of the Bureau of Reclamation. In 1970 Otter Tail purchased over 274 million kilowatt hours of energy from the Bureau (A. 49), equal to about 21 percent of the company's total sales (A. 48). "The Bureau—Otter Tail Contract permits Otter Tail to use the Bureau's transmission system to deliver power to loads of Otter Tail. . . . Otter Tail relies substantially upon the high voltage bulk power supply system of the Bureau for power delivery and reliability" (A. 94). Nevertheless, the Bureau was able to allocate only 205 kw of firm power to Elbow Lake,[4] because of other commitments (A. 55). Otter Tail has repeatedly refused to wheel this miniscule quantity to Elbow Lake (A. 56-61). We may comment that it is

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[3] A. 126-29. This has happened elsewhere. See Part I of this brief, which refers to Senate Committee proceedings in which the Secretary of the Interior named restrictive agreements of this sort with 21 companies.

[4] At a load factor of say 50 percent, this would equate with about 900,000 kwh annually, about one-third of one percent of the number of kilowatt hours of energy that Otter Tail buys from the Bureau.

equal to less than one-tenth of one percent of the company's own generating capacity of 272,245 kw (A. 48), a supply which is in addition to that obtained by the company from the Bureau of Reclamation. This is not a case in which a company is directed to establish a new connection with a government-owned generating plant, for the benefit of a municipality. The company already has 14 such interconnections with the Bureau, by means of which it receives government energy in a quantity some 300 times as great as the quantity of such energy that it is required by the court below to disgorge.

The court found:

> "On an engineering basis, there is no reason why Otter Tail could not wheel power from another supplier to a town which it presently serves at retail. The amount of power required by the town is the same whether it is sold to the town on a retail basis by Otter Tail or is wheeled to the town from another supplier. . . . The same transmission facilities would be used to wheel the power as are used by Otter Tail to deliver the power at retail, so there is no doubt that Otter Tail would have capacity in its lines to wheel power to the town." (A. 107.)

As the court found, "Otter Tail presently wheels Bureau power to 17 municipally owned electric systems in its service area" (A. 105), as well as to 10 governmental institutions and several cooperatives (A. 106-07), all of them preference customers under federal statutes.

Nevertheless, Otter Tail has refused to sell at wholesale, or wheel, to Elbow Lake or any other town which it has previously served at retail, but which has estab-

lished its own municipal power system. In Elbow Lake's case, the present antitrust suit is the culmination of a 20 year struggle to break out of the company's monopoly (A. 50-61), marked by two victories against the company in the Minnesota Supreme Court (A. 51, 56), and one in the Eighth Circuit Court of Appeals (A. 61), but (until the decision below) resulting in frustration because of the company's successful efforts to prevent the village from obtaining a power supply from any other supplier. This blockade was made possible by the company's monopoly of transmission lines in the area, and its refusal to wheel from other suppliers through its bottleneck.

The Federal Power Commission, in proceedings initiated by Elbow Lake, found itself able to grant only partial relief. It ordered the Company to make a temporary interconnection with the Village of Elbow Lake,[5] and later a permanent interconnection.[6] The Commission's order said (A. 190):

> ". . . An interconnection arrangement, meeting all of the tests of section 202(b), is here available. That is so because the record is clear that Otter Tail is capable of serving all of Elbow Lake's power needs without encountering any of the constraints set forth in section 202(b). Thus, if Otter Tail were to supply all of Elbow Lake's requirements, it would sustain no 'undue burden' thereby; no 'enlargement of generating facilities'

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[5] Village of Elbow Lake v. Otter Tail Power Co., 40 F.P.C. 1262 (1968), *aff'd sub nom.* Otter Tail Power Co. v. FPC, 429 F. 2d 232 (8th Cir. 1970). (Reproduced in the Jurisdictional Statement A-120.)

[6] A. 187. Village of Elbow Lake v. Otter Tail Power Co., No. E-7278 (F.P.C., Sept. 13, 1971), *appeal pending sub nom.* Otter *Tail Power Co.* v. *FPC*, No. 72-1088 (8th Cir.).

> would be required; and Otter Tail's 'ability to render adequate service to its customers' would not be impaired. In these circumstances, we believe that the public interest indisputably requires an interconnection."

Thus there is no question here as to whether an interconnection with the village should be ordered, or whether the Commission or the courts should have primary jurisdiction to order one. The Commission itself has done this.[7]

But, in those proceedings, the Commission held that it lacked statutory authority to compel the wheeling of government power to Elbow Lake over the interconnection that it ordered. It said:

> "... We agree with the Examiner that, as a matter of law we cannot compel Otter Tail to wheel Bureau of Reclamation power to Elbow Lake."[8]

The Commission's order therefore established rates which require Elbow Lake to pay the company the

---

[7] The Commission nevertheless contends, quite erroneously (Brief, p. 15): "The order of the District Court, which has the effect of ordering a compulsory interconnection, constitutes an abrogation of these provisions of the Federal Power Act." (Sec. 202(b).) To the contrary, the court's findings take note of the Commission's own decision ordering a permanent interconnection (A. 61), and its judgment, ordering wheeling, provided that the defendant shall not be compelled to furnish wheeling service to a municipality except at compensatory rates, filed with and subject to approval by the Federal Power Commission (A. 209).

[8] A. 193-94. The Commission's decision directing a permanent interconnection, Sept. 13, 1971. The court had entered its "Memorandum & Order" Sept. 9, 1971 (A. 27). It entered its Findings of Fact and Conclusions of Law Oct. 22, 1971 (A. 47), its Judgment Oct. 22, 1971 (A. 131), and an Amended Judgment Nov. 10, 1971 (A. 207).

latter's fully allocated cost of service (A. 200-02), not (as Elbow Lake desired) the cost of the federal power received into the company's system plus a reasonable transmission charge.[9]

In the present action, the Department of Justice sought, among other remedies for violation of the antitrust laws, to compel what the Federal Power Commission says it lacks authority to require: the wheeling of government-generated power at wholesale to congressionally designated preference customers, in lieu of delivery of high-cost company power. This would be done via the physical interconnection that the Commission has ordered.

The court below found in the government's favor. The FPC Brief summarizes the court's opinion[10] (Brief, p. 4-5):

> "After finding that Otter Tail had monopoly power in the relevant market (retail sales of elec-

[9] The rates thus established by the Federal Power Commission (A. 201-02) and those established by the U.S. Bureau of Reclamation (Published Schedule MRB-F5, not in the Jurisdictional Statement or Appendix) are compared below. No figure is available as to the transmission charge which should be added to the latter, to compensate Otter Tail for wheeling. The court left this for the Commission to fix (A. 209).

Capacity charge		*Energy charge*	
FPC	*U.S.B.R.*	*FPC*	*U.S.B.R.*
$46.97 per kw per year, in 12 equal monthly instalments	$12 per kw per year ($1.00 per kw per month)	.6073 cent per kwh	.3 cent per kwh

[10] The court's meticulous findings of fact are much more detailed and deserve careful attention. They tell a dramatic story of harassment and refusal to deal (A. 47-86), of the company's absolute dominance in transmission (A. 91-101), of "The Use of Litigation

tric power to towns in Otter Tail's service area) (App. 7-8) and had strategic dominance in transmission facilities in its service area (App. 8-10), the Court found that Otter Tail had sought wrongfully to maintain its monopoly power (1) by refusing to use its transmission facilities to sell at wholesale or to wheel power to several municipalities (App. 11-13), (2) by engaging in court litigation to defeat attempts of four municipalities to establish municipal power systems (App. 14-16), and (3) by enforcing the provisions of its contracts with the Bureau of Reclamation and with electric power cooperatives which prohibit the use of Otter Tail's transmission lines to transmit power to former retail customers of Otter Tail (App. 16-18). The Court found these contracts not to be immune to antitrust (App. 18-20)." [FPC's page references are to the Appendix to the Jurisdictional Statement.]

The court accordingly entered a judgment which provided, *inter alia*:

"II.

"Defendant has attempted to monopolize and has monopolized interstate trade and commerce in the retail distribution of electric power in cities and towns located in its service area, in violation of Section 2 of the Sherman Act.

* * * * *

"IV.

"Defendant is enjoined and restrained from:
"(A) Refusing to sell electric power at whole-

to Preserve and Maintain a Monopoly" (A. 102-03), of the "Discriminatory Nature of the Otter Tail Refusal to Deal Policy" (A. 103-11), the lack of justification for its refusal to deal (A. 111-26), and the benefits that Otter Tail derives from its own Bureau of Reclamation contract (A. 126-29).

sale to existing or proposed municipal electric power systems in cities and towns located in any area serviced by Defendant;

"(B) Refusing to wheel (transmit) electric power over its transmission lines from other electric power suppliers to existing or proposed municipal electric power systems in cities and towns located in any area serviced by Defendant;

* * * * *

"(D) Entering into, enforcing or claiming any rights under any contract, agreement or understanding which prohibits the use of Otter Tail's transmission lines to wheel (transmit) electric power from other electric power suppliers to existing or proposed municipal electric power systems;" (A. 207-08.)

But the court, in that judgment, was careful to say:

"V.

"The Defendant shall not be compelled by the Judgment in this case to furnish wholesale electric service or wheeling service to a municipality except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission." (A. 209.)

The Federal Power Commission is now in the anomalous position of supporting the company by an amicus brief in this Court, urging the Court to reverse and thereby deny to the judiciary the authority to order wheeling to crack open the monopoly which prevents low-cost government power from reaching the customers to whom Congress granted a preference, an authority which the Commission asserts that it itself does not have. An added irony is that this government power would in fact be redelivered by Otter

Tail to Elbow Lake over the interconnection that the Commission itself has ordered, and at compensatory rates (as the court amended its judgment to say) which must be approved by the Commission (A. 206, 209).[11] The Commission's argument seems to be that Section 202(b) of the Federal Power Act not only failed to give the Commission the authority to require a company which receives low-cost government power to redeliver it to municipalities in compliance with the federal preference statutes, but, by so failing, somehow generated an affirmative shield for the company which precludes the courts from enforcing the Sherman Act by a wheeling order.

We are in agreement with the government's position that the lower court was entitled to use its full range of equitable powers to ensure that Appellant would not continue practices which jeopardized the freedom of competition within the electric power industry, and that Section 202(b) of the Federal Power Act is not a shield which precludes the enforcement of the Sherman Act by the courts. There is nothing in the doctrine of primary jurisdiction (which is the basis of the Commission's argument) which prevents the courts from granting relief under the Sherman Act that the Commission says it cannot give under the Federal Power Act.[12]

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[11] The court's findings take note of the Commission's decision ordering a permanent interconnection with Elbow Lake (A. 61).

[12] In Part II of this brief we suggest that the Commission takes too negative a view of its statutory authority to order wheeling to correct antitrust abuses. But even if the Commission were found to have such authority, this would not displace the jurisdiction of the courts to include wheeling in a judgment encompassing a broad spectrum of remedies, as here, dealing with a number of kinds of antitrust violations.

An amicus brief filed on behalf of 17 of the principal power companies in the Nation argues that wheeling of government power to the public agencies named by the federal statutes as preference customers would result in unfair competition. This argument should be addressed to the Congress in support of a bill (none is pending) to repeal the preference statutes. It requires no answer here, other than to point out that the issue in this case is somewhat narrower, namely, whether a court may order wheeling as a remedy required by violations of the antitrust laws. Beyond this, the court below has given the companies their answer: ". . . even the threat of losing business does not justify or excuse violating the law." (A. 46.)

Another power company brief, on behalf of four equally prestigious companies, argues that the judgment below is at variance with the scheme of federal and state regulation which encompasses the electric utility industry.[13] Can it be seriously argued that antitrust violations, so graphically identified by the court below, which would unquestionably be subject to injunction if perpetrated by any other industry, are to be condoned because the guilty party is part of a regulated industry? And particularly when, as here, both the Federal and State regulatory commissions have proclaimed their lack of authority to order the remedy, wheeling, which the court found essential to put an end to the violations? It is astonishing to find responsible elements[14] of the industry closing ranks to sup-

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[13] But the North Dakota Public Service Commission, like the Federal Power Commission, had refused to order wheeling, on the ground that it lacked jurisdiction (A. 69).

[14] The power company amici represent 20% of the Nation's total installed generating capacity. FPC, STATISTICS OF PRIVATELY OWNED ELECTRIC UTILITIES IN THE UNITED STATES (1970).

port such irresponsible behavior by one of their brethren,[13] and insisting, moreover, that the power to police such violations of the antitrust laws is possessed, to the exclusion of the courts, by a federal agency that proclaims itself powerless to order the one effective remedy, wheeling.

SUMMARY OF ARGUMENT

I. The monopolistic character and huge size of the electric power industry (with an invested capital 60 percent greater than that of the second industry, petroleum), and the trend toward concentration of large low-cost generating units in the control of a comparatively few companies, all make it imperative that the antitrust laws be available to preserve the competition afforded by consumer-owned power systems. Congress, in enacting the Federal Power Act, did not intend to condone practices in the electric industry which would be subject to injunction under the Sherman Act if perpetrated in any other industry. The predatory practices of some companies having monopolistic control of transmission systems, such as Otter Tail, in choking off consumer-owned utilities' potential supplies of power from alternative lower-cost sources, such as federal generating plants, can be defeated only by injunctions, such as that issued in this case, against refusal of the monopolist to "wheel" power from competitive sources of supply over its transmission lines to the consumer-owned utility.

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[13] The court found (A. 109-10): "Otter Tail is the only investor owned electric utility in the United States which has filed a statement with the Federal Power Commission to the effect that it does not hold itself out generally to sell power at wholesale."

II. This case does not present a problem of primary jurisdiction as between the courts and the Federal Power Commission. The court below exercised its equity powers under the Sherman Act only in the one respect in which the Commission had determined that it lacked jurisdiction under the Federal Power Act, that is, to order the company to wheel power from the Bureau of Reclamation to the Village of Elbow Lake (the Bureau's "preference customer" under federal laws) over the interconnection with the Village's municipal system that the Commission had itself ordered. The effect is to require the company to disgorge to the Village about 1/300 of the energy that it is already receiving from the Bureau of Reclamation, for the company's benefit, through 14 existing interconnections between the Bureau and the company. Moreover, the court's judgment provided that the Commission, not the court, would determine the compensation to be paid by Elbow Lake to the company for this transmission service. The Commission's present demand that the court be ousted from jurisdiction is thus not a plea for primary jurisdiction in the Commission, for the Commission proclaims that it lacks jurisdiction to enforce the one remedy, wheeling, which is essential to the attainment of the objectives of the Sherman Act. It is, in effect, an argument that this remedy is not available to any federal authority, judicial or executive, no matter how extreme the necessity for it, no matter how outrageous the power company's violation of the antitrust laws may be. We say that Congress did not impliedly amend the Sherman Act to excise this one injunctive remedy by enactment of the Federal Power Act.

III. The make-weight argument that, even if the antitrust laws are applicable to the electric power

industry, the specific remedy of an injunction against refusal to wheel is contrary to the policy of Congress, is wholly without merit. There is nothing in any act cited implying that, if a power company refuses to make a wheeling contract (as in this case), the company's veto shall control a federal court's decision that such wheeling must be ordered to put an end to that company's predatory suppression of competition.

ARGUMENT

1. The Practices Of Companies Such As Otter Tail Aimed At Stifling Competition Require Application Of The Antitrust Laws To Preserve Competition Supplied By Publicly Owned Utilities

The fact that the electric power industry is partially regulated does not diminish the importance and need for competition in that industry.[16] Indeed, the anti-competitive practices of members of a regulated industry require close judicial surveillance to preserve and foster competition. *See, e.g., United States* v. *Philadelphia National Bank*, 374 U.S. 321, 368-70 (1963); *California* v. *FPC*, 369 U.S. 482, 490 (1962).

The electric power industry is mammoth in size and highly concentrated. In 1962, the industry's capital assets were more than 60 percent greater than those of its nearest rival, the petroleum industry. FPC, 1 NA-

[16] FPC economists have testified extensively as to the need for competition in the electric industry. Concern for competition has increased because of economic and engineering trends in the industry. *E.g.*, Statement of David A. Schwartz, *Hearings on the Competitive Aspects of the Energy Industry Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess., pt. 2, at 558 (1970); Dr. Henry Einhorn, *id.* at 784. For a discussion of antitrust policy in the electric power industry, see Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 64 (1972).

TIONAL POWER SURVEY at 11 (1964). Since 1964, annual capital expenditures have been about $13 billion and it is estimated that capital requirements in the next two decades will be approximately $500 billion. FPC, 1970 NATIONAL POWER SURVEY I-20-1 (1971). At the end of 1970 the Nation had an installed generating capacity of about 340,000 megawatts, a figure that will be quadrupled in two decades. *Id.* at I-1-17. The investor-owned segment of the electric power industry consists of approximately 245 companies. The 200 largest systems provide 75 percent of the Nation's generating capacity and serve 80 percent of the Nation's customers. *Id.* at I-2-4.

The industry's trend is toward mergers and holding companies. Some observers believe that the investor-owned utilities will group into only 15 or 20 large systems. *Id.* at I-2-8. The projected growth of the industry and the trend toward consolidation imply such opportunities for uncontrollable power as to make the antitrust jurisdiction of the federal courts plainly applicable to this industry.

Congress, aware of the industry trend toward economies of scale, and aware of the movements toward mergers and holding companies, directed the Atomic Energy Commission to guard against anticompetitive effects of granting licenses for the construction of nuclear plants. 42 U.S.C. § 2135. The result of the legislation has been a recognition that not only is competition to be favored and encouraged, but that investor-owned utilities should permit public agencies (and smaller investor-owned utilities) to participate actively as partners or joint venturers in new nuclear plants. *E.g., Pacific Gas & Electric Co.*, Atomic Energy Commission, Docket Nos. 50-398A, 50-399A, 37 Fed. Reg.

16423 (Aug. 12, 1972); *Jersey Central Power & Light Co.*, Atomic Energy Commission, Docket No. 50-363A, 37 Fed. Reg. 19711 (Oct. 9, 1971).

Competition in the wholesale power industry is supplied by the public agencies. That competition is known as "yardstick competition" or the concept of comparison. Publicly owned utilities, the consumer-owned members of APPA, furnish this "yardstick competition" that results in advantages to the consumer in the form of low rates for electricity. The benefits to consumers are substantial. In 1970 the average revenue for private power companies was 2.22 cents per kwh, 51 percent higher than the average publicly owned utility revenues of 1.47 cents per kwh. Also, in 1970, the public power residential consumer paid 12.1 percent less than the average private power consumer for a 34.6 percent greater amount of power consumed. The average residential consumer of private power paid $148.92 per year for electricity while the public power consumer paid only $132.89 per year and received 34.6 percent more power.[17]

On a broader basis, "yardstick competition" provides regulatory agencies with information concerning feasible company performance and supplies regulators with empirical data for policy decisions. In addition, "yardstick competition" affords management itself a means of evaluating its market performance.

Annexed to this brief is a table (APPA Appendix A) which compares the growth of total net income of investor-owned utilities in the United States with the growth of net income of typical utilities operating in

[17] 30 PUBLIC POWER, LOCAL PUBLIC SYSTEMS PROVIDE CONSUMERS WITH LOWER COST POWER 12, 13 (July 1972).

the areas in which power is available from major federal power plants: Hoover Dam, the Missouri Basin, Bonneville Power Administration, Tennessee Valley Administration. This table shows that whereas net income of all utilities has increased from 1940 to 1970 by the impressive figure of 622 percent, that of representative major companies in the areas affected by federal generation of power have increased at a still greater rate: Hoover Dam, 1047 percent; Missouri Basin, 866 percent; Bonneville, 786 percent in one case, 3604 percent in another; Tennessee Valley, 837 percent in one case, 1377 percent in another. Otter Tail has not suffered; its 1970 net income is 680 percent of its 1940 net income, a little ahead of the national average increase of 622 percent, but not as good as the growth of net income of some utilities in the areas into which the fresh air and sunlight of competition from federal sources of generation has entered. So much for the gloom over federal power competition voiced in the amicus briefs of the power companies.

The beneficial results of this competition are amply demonstrated by TVA's effect on investor-owned utilities' rates in the southeast region. In addition to supplying consumers in its service area with more power at lower cost than most other parts of the country, TVA's rate policies have influenced other utilities to reduce rates. Studies show that private power companies nearest TVA have had lower rates and higher usage than companies farther from TVA, and that rates climb and usage drops as distance increases.[18] From 1937, the earliest year for which Federal Power Commission data are available, to 1963, the record shows that earnings available to the common

[18] TVA, TVA's Influence on Electric Rates at 9-10 (1965).

shareholders of the larger privately owned utilities in the United States multiplied five times and similar earnings of companies bordering TVA multiplied more than twelve times. *Id.* at 12.

Unfortunately, in spite of the benefits from competition, some investor-owned utilities, such as Otter Tail in this case, have been at war for many years with the municipalities in their areas which have been struggling to establish publicly owned systems for themselves. As a result, some privately owned companies have attempted, often vigorously and bitterly, to stifle and destroy competition from the government-owned and consumer-owned utilities. *E.g., Alabama Power Company* v. *Ickes*, 302 U.S. 464 (1938); *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118 (1938); *Kansas City Power and Light Co.* v. *McKay*, 115 F. Supp. 402 (D. D.C. 1953), *judgment vacated for lack of standing*, 225 F. 2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955). Some of the anticompetitive practices are as follows, as the record in this case shows.

Companies frequently attempt to prevent new municipal systems from being formed and attempt to buy out existing systems. Their battle plans rival the plan for the Normandy invasion in length and detail. For example, eight utilities, including Otter Tail, met in 1966, 1967, 1968, and 1969 to decide on a program and plan of action to prevent municipalities from forming their own utility system.[19]

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[19] The companies' detailed plans are printed in the Congressional Record. 115 CONG. REC. 40336 (daily ed. Dec. 19, 1969). The conference objective of the 1966 meeting was:

"To study the problem of promotion of municipally owned electric systems and to discuss and determine: What is happening,

Electric utilities throughout the Nation have been forming "pools" to perform functions relating to generation, transmission, joint planning, ownership of facilities, and coordination of operation. These power pools tend to lower costs and provide for a more reliable bulk power supply. The smaller publicly owned utilities are often excluded from these power pools or are unable to attain equitable participation in the arrangements. *E.g., Statesville* v. *AEC,* 441 F. 2d 962 (D.C. Cir. 1969); *Municipal Elec. Ass'n* v. *SEC,* 413 F. 2d 1052 (D.C. Cir. 1969); *Mid Continent Area Pool,* F.P.C. Docket No. E-7734. The smaller systems and their consumers thus cannot realize the inherent benefits of coordinated pooling arrangements because of the exclusionary policies of the investor-owned utilities.

Investor-owned utilities frequently have refused to interconnect facilities for any purpose, whether it be a sale of power, an exchange, or for emergency backup. A. 38; *e.g., Gainesville Util. Dep't* v. *Florida Power Corp.,* 402 U.S. 515 (1971); *Shrewsbury Municipal Light Dep't* v. *New England Power Co.,* 32 F.P.C. 373 (1964), *aff'd sub nom. New England Power Co.* v. *FPC,* 349 F. 2d 258 (1st Cir. 1965). Refusal to connect may result in a small consumer-owned utility being

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What's the problem, Why it's happening, What can be done about it, How to keep it from happening."

The agreed upon tactics included:

"—influencing franchise elections

—preventing the formation of joint generating and transmission arrangements between publicly owned utilities

—establishing a task force to provide step-by-step guidance on acquisitions and to provide for reviewing and updating techniques based on experience

—forming a clearinghouse on matters of municipal agitation or unrest." *Id.* at 40337.

isolated, thereby seriously impairing adequacy and reliability of service to consumers.

Publicly owned utilities face two alternatives, or a combination of the two, in securing a supply of bulk power. The locally owned utility can either generate its own power, or purchase bulk power at wholesale from other utilities. In some instances, including the instant case, an investor-owned utility has refused to sell bulk power at wholesale to a municipality (A. 38). See also *Public Service Co. of Indiana*, 41 F.P.C. 398 (1969); *Shrewsbury Municipal Light Dep't* v. *New England Power Co.*, 32 F.P.C. 373 (1964), *aff'd sub nom. New England Power Co.* v. *FPC*, 349 F. 2d 258 (1st Cir. 1965). The reason is too often anticompetitive, *i.e.*, the investor-owned utility serves a municipality at the retail level and thus desires to prevent the municipality from serving its own citizens via the purchase of wholesale power. In short, the investor-owned utility, as in this case, may be determined to maintain a monopolistic position in the retail market and prevent competition caused by wholesale marketing arrangements (A. 38).

Wheeling (*i.e.*, transmission of power between seller and purchaser accomplished over transmission lines of a third party) is a normal business function of utilities engaged in the supplying of bulk power at wholesale. The investor-owned utilities frequently wheel power for one another (as Otter Tail does) but, as here, refuse to wheel power for consumer-owned systems (A. 39). The purpose is to choke off competition.

Another anticompetitive practice engaged in by investor-owned utilities is the allocation of wholesale customers with the result that the customer has only

one choice for a wholesale supplier. A consent decree involving such activity has been filed in *United States* v. *Florida Power Corp.* (M.D. Fla. July 19, 1971). Division of the wholesale market has two harmful effects: competition among wholesale suppliers is eliminated and customers of the wholesale suppliers are deprived of a competitive market.

Another practice used to discourage competition involves restrictive provisions in contracts (A. 31, 37). The utility may forbid the wholesale buyer to sell to large load consumers in order to protect the private utility's market for large customers. This practice was held illegal in *Georgia Power Co.* v. *FPC*, 373 F. 2d 485 (5th Cir. 1967).

Inter-company agreements imposing territorial restrictions on wholesale transactions have been held to violate the Sherman Act in *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Elec. Light & Power Co.*, 184 F. 2d 552 (4th Cir.), *cert. denied*, 340 U.S. 906 (1950).

Some investor-owned utilities, using the leverage of their monopolistic position, insert "requirements" provisions in wholesale contracts with municipalities and cooperatives. These anticompetitive restrictions, curtailing a buyer's future options, are generally of three varieties: (i) a long-term agreement by the purchaser not to build any new generating capacity of its own; (ii) a long-term agreement requiring the purchaser to buy all or all but a stated amount of its power requirements; or (iii) an agreement not to purchase power from any other supplier. *See Public Service Co. of Indiana*, 41 F.P.C. 398 (1969); *Southwestern Electric Power Co.*, F.P.C. Docket No. E-7711 (1972).

The use of restrictive provisions is not confined to contracts between the seller and buyer. Investor-owned utilities have placed restrictive provisions, affecting third parties, in contracts between the investor-owned utilities and the federal government. Here (A. 31, 37), the company obtained, in a contract with the U.S. Bureau of Reclamation, a clause relieving it of any obligation to "wheel" power from the government to preference customers of the United States who were formerly customers of the company. The lower court enjoined its enforcement.

Common examples elsewhere include quantity limitation for sales of federal power to preference customers, territorial restriction, or provision preventing the sale of power for resale. The Secretary of the Interior provided the Senate Subcommittee on Antitrust and Monopoly with "a list of all contracts between Federal power marketing agencies and private utilities containing any provisions which could be construed as falling under one or more of nine separately stated restrictive categories." Letter from the Assistant Secretary of the Interior to Senator Philip A. Hart, Jan. 12, 1972. The list is lengthy; federal contracts with 21 investor-owned utilities were found to contain restrictive provisions adversely affecting statutory preference rights of many public agencies and cooperatives. Those contracts frustrate the intent of Congress which has repeatedly stipulated that public agencies have preference in the purchase of federally generated power.[20]

Another anticompetitive tactic of companies is to impede a consumer-owned utility's plans for initiation or

[20] Statutes cited note 1 *supra*.

expansion of generating capacity and transmission facilities by vexatious litigation, without merit. *E.g.*, *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938); *Duke Power Co.* v. *Greenwood County*, 302 U.S. 485 (1938); *Alabama Power Co.* v. *Alabama Electric Co-operative, Inc.*, 394 F. 2d 672 (5th Cir. 1968); *Rural Electrification Administration* v. *Northern States Power Co.*, 373 F. 2d 686 (8th Cir.), *cert. denied*, 387 U.S. 945 (1967). (Otter Tail was also a plaintiff in that case, seeking to prevent competition.) The record in this case is a prime example of the use of vexatious and frivolous litigation, in two stages: (1) to prevent the formation of a municipal utility, (2) to prevent the issuance of its bonds. As the court found (A. 102):

> "The sale of revenue bonds by municipalities to finance the establishment of municipal electric systems is impossible if there is any litigation pending or impending which concerns the municipal power project."

In the case of Elbow Lake, such company-financed litigation resulted in two decisions in the Village's favor by the Supreme Court of Minnesota (A. 51, 56), and one by the Court of Appeals for the Eighth Circuit (A. 61). But the delays so occasioned have approximated a decade, and will not end until this Court speaks.

This pattern of litigation was uniformly followed by Otter Tail, resulting in delays and expenses of such magnitude that some little towns (*e.g.*, Hankinson, N.D.) collapsed and settled, notwithstanding their success in the Supreme Court of the State (A. 70). In another (Colman, S.D.), after two State Supreme Court decisions in the town's favor and delays of three years occasioned by frivolous litigation, the town persisted and has its power system (A. 74, 76-77). In

another (Aurora, S.D.), company-financed litigation delayed establishment of the municipal system three years (A. 83).

These various activities, refusals to wheel or to sell at wholesale, exclusion from power pools, vexatious litigation and propaganda, may appear to the company concerned to be innocuous and in the realm of sound business judgment and practice, particularly when each activity is viewed in isolation. But, when these activities are viewed in totality, with the realization that the fundamental purpose of the activities is to prevent or stifle competition, the activities are blatantly anticompetitive and, in some cases, in violation of the antitrust laws.[21]

Predatory practices cannot be condoned. Some agency, either the executive or the judicial, bears the responsibility for curbing anticompetitive practices,

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[21] The position taken by the amici companies against application of the antitrust laws is quite understandable. Many of these companies have attempted to prevent competition from consumer-owned utilities. *E.g.*, Alabama Power Co. and Iowa City Power and Light v. Ickes, 302 U.S. 464 (1938); Tennessee Electric Power Co. v. TVA, 306 U.S. 118 (1939); Rural Electrification Administration v. Northern States Power Co., 373 F. 2d 686 (8th Cir.), *cert. denied*, 387 U.S. 945 (1967).

Other companies have been earmarked for anticompetitive activities by the Department of Justice pursuant to the Atomic Energy Act, 42 U.S.C. 2135. *E.g.*, Carolina Power & Light Co., Atomic Energy Commission, Docket No. 50-400, 37 Fed. Reg. 18046 (Sept. 6, 1972); Pacific Gas & Electric Co., Atomic Energy Commission, Docket Nos. 50-398A, 50-399A, 37 Fed. Reg. 16423 (Aug. 12, 1972); Virginia Electric & Power Co., Atomic Energy Commission, Docket Nos. 50-404A, 405A, 37 Fed. Reg. 16221 (Aug. 11, 1972); Southern California Edison Co. and San Diego Gas & Electric Co., Atomic Energy Commission, Docket Nos. 50-361A, 50-362A; Alabama Power Co., Atomic Energy Commission, Docket Nos. 50-348, 50-364.

punishing the violators, and setting a deterrent for future anticompetitive schemes. The judiciary ought to have that primary responsibility "lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission." *California* v. *FPC*, 369 U.S. 482, 490 (1962).

Generally speaking, any acts which constitute a violation of the federal or state antitrust statutes may be enjoined. *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927). In fashioning a remedy for violation of the antitrust laws, the court has wide discretion in molding its decree to meet the exigencies of the particular case. *United States* v. *National Lead Co.*, 332 U.S. 319 (1947). In complying with a statutory direction to prevent and restrain monopolies, a court of equity may adapt its remedies to existing conditions. *United States* v. *U.S. Steel Corp.*, 251 U.S. 417 (1920).

Here, since the court found that Otter Tail's refusal to wheel power to municipalities was a part of a scheme prohibited by the Sherman Act, it correctly enjoined the company from further unlawful action to maintain its monopoly. This Court has made it clear that a court of equity has the power to uproot all parts of an illegal scheme in order to rid trade or commerce of all taint of violation of the antitrust laws. *United States* v. *Paramount Pictures*, 334 U.S. 131 (1948).

In addition to enjoining Otter Tail from refusing to wheel, the court also enjoined Appellant from entering into, enforcing or claiming any rights under any contract, agreement or understanding which prohibits the use of Otter Tail's transmission lines to wheel electric power from other electric power sup-

pliers to existing or proposed municipal systems. Amended Judgment of the District Court, A. 207, 208.

The net effect of the two wheeling injunctions is the break-up of Otter Tail's monopoly by opening up an alternative supply of inexpensive electric energy to municipalities. These two provisions prevent Otter Tail from discriminating against a municipality solely on the ground of a company policy against wheeling power to a town it had formerly served at retail. They are within the classic pattern of antitrust remedies.

A congressional intent to displace the judiciary's function in the enforcement of the antitrust laws and substitute that of an administrative agency is not to be lightly inferred. As we shall see, the Federal Power Act does not support such an inference.

II. Appellant's And FPC's Interpretation Of The Primary Jurisdiction Doctrine Would Emasculate The Sherman Act And Leave Public Agencies Without Their Most Effective Remedy

Appellant and the Federal Power Commission contend that, since the Commission has jurisdiction under the Federal Power Act to order compulsory interconnections with public utilities under Section 202(b) of the Federal Power Act, it has primary (indeed exclusive) jurisdiction to consider the antitrust issues in the case at bar (Otter Tail Power Co. Brief at 26; FPC Amicus Curiae Brief at 3), although the Commission (so it contends) lacks jurisdiction to order the relief that the case requires. That relief, the court below found, *inter alia*, is an injunction restraining the company from refusing to wheel U.S. Bureau of Reclamation power to Elbow Lake's municipal system over the interconnection ordered by the Commission under Section 202(b). What Otter Tail in effect pro-

poses is to bootstrap itself into antitrust exemption by an erroneous application of the doctrine of primary jurisdiction to the area of public utility regulation. Acceptance of Appellant's argument would not only strip the federal courts of concurrent jurisdiction over infractions of the antitrust laws, but would deny the victims of predatory practices the equitable remedies guaranteed by the Sherman Act, since the Federal Power Commission (on its construction of the Federal Power Act) lacks the power that the court exercised, to enjoin the company's refusal to wheel government power to municipalities.

The primary jurisdiction cases on which the company relies are not in point. None of them related to a regulatory commission which professedly lacked the power to order the relief obtained by the United States in an antitrust action, as in this case.

This Court has stated that "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *United States.* v. *Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956).

Courts will indeed defer to an agency's experience and expertise in solving questions involving voluminous and intricate facts not within the conventional experience of judges or requiring the exercise of administrative discretion. *See, e.g., Texas & Pac. Ry. Co.* v. *American Tie & Timber Co.*, 234 U.S. 138, 147 (1914); *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 258, 294 (1922); *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). But this

controversy does not involve the factual complexities of the ICC rate and tariff cases cited by Appellant in its brief. In actuality, the converse of Appellant's FPC expertise argument is true: Since the issues are primarily concerned with questions of law, the courts are better able to interpret and apply the applicable law, and they, not the FPC (according to the FPC's argument) possess the essential power to order wheeling.

But suppose, contrary to fact, that the Commission, in the two *Otter Tail* cases,[22] had given antitrust factors the same full consideration that the court did (the Commission had this opportunity, but did nothing with it), and suppose further that the Commission had reached the same conclusion that the court did, that Otter Tail's refusal to wheel government power to the municipalities violated the Sherman Act. Would, or would not, the Commission have authority to order the wheeling? The Commission says not. If that is so, the Commission's insistence on its "primary jurisdiction" comes to a demand that it have the power to bury the case, and that Congress intended Section 202(b) to thwart the Sherman Act. That conclusion is insufferable.

In the instant factual setting, the Commission rejected its Staff's urgings to weigh antitrust considera-

[22] In Village of Elbow Lake v. Otter Tail Power Co., 40 F.P.C. 1262 (1968), *aff'd* 429 F.2d 232 (8th Cir. 1970), the Commission ordered the company to make a temporary interconnection with Elbow Lake under Section 202(b) of the Federal Power Act, but declined to express an opinion as to its power to order wheeling. In Village of Elbow Lake v. Otter Tail Power Co., No. 603 (FPC, Sept. 13, 1971), the Commission ordered the interconnection made permanent, but said: "We agree with the Examiner that, as a matter of law we cannot compel Otter Tail to wheel Bureau of Reclamation power to Elbow Lake." (A. 193-94.)

tions in determining whether to grant a permanent interconnection. (Staff memorandum dated Aug. 21, 1969.) The Commission's sole concern with antitrust issues, as voiced in its opinion, was whether possible erosion of Otter Tail's business would occur because of increased competition. *Village of Elbow Lake* v. *Otter Tail Power Co.*, No. 603 (F.P.C., Sept. 13, 1971). The Commission's present interest in taking exclusive responsibility for antitrust issues in the case contrasts remarkably with its position in *Gulf States Utilities* v. *FPC*, No. 71-1178, currently before this Court. There, the Commission has termed antitrust considerations totally irrelevant in Section 204 proceedings.[23] This leaves aggrieved parties in a quandry: Where do consumer-owned competitors of the investor-owned utilities go for relief from the latter's predatory practices? In *Gulf States* the Cities have seen the Commission shut the door on antitrust considerations, while in the instant case the Commission seeks to assert itself as the trust buster to the exclusion of the Department of Justice and the courts. But, in the same breath, it proclaims that, while it has authority to order a utility (already interconnected with a federal power system, and purchasing large quantities of power therefrom) to interconnect with a municipal system, it has no authority to order that utility to wheel power from the federal generators to the municipal consumers over that interconnection, even if the quantity at issue is only 1/300 of the quantity of federal energy that the company takes into its system. The question here is really whether the courts shall

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[23] The Court of Appeals in that case called the Commission's negative view of its authority "tunnel vision." City of Lafayette v. FPC, 454 F.2d 941, 951 (D. C. Cir. 1971).

be stripped of authority to enforce the antitrust laws in an essential respect at the behest of a commission which says that it lacks that very authority: the power to compel the monopolist to wheel power from the federal government to the municipalities now subjected to the company's monopoly.

This is not a case where the administrative agency should take primary jurisdiction of an antitrust case in order to achieve uniformity of its regulatory activities, such as *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). That case decided that in order to ensure the centralization of authority to provide uniform rate standards—a basic policy of transportation regulation being uniformity for all shippers in like circumstances—rate complaints must be first channeled to the ICC despite the fact that the Interstate Commerce Act on its face purported to give concurrent jurisdiction to the courts. That decision and others dealt with agencies which have jurisdiction over complex and technical areas and which are required to consistently apply rate and other types of regulation, and which have power to issue and enforce the necessary orders. These decisions stress the fact that, if the courts and administrative bodies were to exercise concurrent jurisdiction, varying decisions across the land would bring chaos to the uniform rate schedules and rules set forth by the agencies.

In this case there is no danger of diverse findings as to issues covered by the Federal Power Act and the antitrust laws. The federal court did not attempt to make a determination of the rates and conditions of service, and other Federal Power Commission matters. On the contrary, the court was cognizant of, and specifically preserved, the FPC's authority to pre-

scribe the rates and other terms and conditions applicable to wheeling (A. 206, 209). Its decision was confined solely to upholding the requirements of the Sherman Act by investigating monopolistic practices and granting equitable relief to alleviate practices which were deemed to be noncompetitive (A. 208-09).

The only uniformity [34] that would result from sustaining the Commission's interpretation of Section 202(b) as excluding the Department of Justice from enforcement of the Sherman Act in the courts would be the uniformity of the graveyard, since the Commission cannot (or so it believes) compel wheeling of government power to a preference customer, and (if the Commission's argument is sustained), the Department of Justice cannot invoke the Sherman Act to do so. The argument of the company and the Commission leads to this: No matter how flagrant the monopolist's violation of the antitrust laws may be, wheeling is one form of relief which the courts cannot grant, for the reason that the Commission cannot grant it. One would suppose that the reverse of that conclusion would be compelled by that premise.

We do not find in this case circumstances that require invocation of primary jurisdiction by an agency

[34] Indeed, FPC's jurisdiction is so limited that the courts must, of necessity, often exercise original jurisdiction. In a statement by John N. Nassikas, Chairman of the Federal Power Commission, the Section of Public Utility Law of the American Bar Association was told of the Commission's limited jurisdiction. Commissioner Nassikas said that authority over the electric utility industry in economic areas was more circumscribed than under the Natural Gas Act and that the Commission has jurisdiction over only about 15% of the kilowatt hours sold annually and less than 7% of the annual dollar volume represented by those sales. Release of Address by John N. Nassikas, before the Section of Public Utility Law of the A.B.A., Aug. 14, 1972, at 1.

to avoid needless friction between that agency and the federal courts. There are, of course, cases in which a workable allocation of functions between the court and agency must be made, so that neither usurps those functions of the other. *United States* v. *Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956). But such an allocation of functions has already occurred in this case. The Commission, not the court, ordered the interconnection (A. 187, *et seq.*). The Commission, not the court, will determine compensation to the company (Amended Judgment, A. 207, 209). The court enjoined Otter Tail from refusing to wheel government power over this interconnection (A. 208), in the asserted absence of jurisdiction in the Commission to do so (A. 193-94), in order to put an end to the company's violation of the antitrust laws.

In such circumstances, the question of whether the judicial or administrative tribunal shall take initial action in antitrust matters has been conclusively decided by this Court. In *California* v. *FPC*, 369 U.S. 482 (1962), this Court stated:

> "Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. [Citations omitted.] The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission." 369 U.S. at 490.

Frustration would indeed be the consequence if the FPC, lacking authority to order wheeling (or so it believes), is permitted to take over enforcement of

antitrust policies which can only be made operative by a wheeling order.

There is thus no real conflict over primary jurisdiction in this case.

If the Court should nevertheless determine that the Federal Power Commission does have primary jurisdiction here, we respectfully suggest that the Court reexamine, and reject, the Commission's position that it lacks authority to order wheeling to cure a violation of the antitrust laws. The Commission may have more authority than it thinks it has, a rare phenomenon, but not an unknown one. *Cf. Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

Certainly, in other cases involving strong public interest factors, the Commission has found itself empowered to order wheeling.

The Department of the Interior, by regulation, preconditions the grant of a right-of-way over public lands upon acceptance of the obligation to wheel. An applicant for a right-of-way for a transmission facility must agree to accept the right-of-way grant subject to the condition that the Department of Interior be allowed to utilize any surplus capacity of the applicant's transmission facility. 43 C.F.R. 2851.1-1(a)(5)(ii)(1972). In *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952), an investor-owned utility applied for a license to construct, operate, and maintain a hydroelectric project on the lands of the United States and to construct two transmission lines across these lands. The FPC, on the advice of the Secretary of the Interior, approved the project on the condition that the licensee interconnect with the transmission facilities of the United States and transport energy generated by the

United States over the licensee's proposed transmission lines. The power company protested the arrangement on the grounds that the Commission had no authority to attach these conditions. The Supreme Court upheld the wheeling conditions on the ground that Section 4(g) of the Federal Power Act allows the Commission the authority to investigate the actual or intended occupancy of public lands for the purpose of development of electric power and to issue such order as it may find appropriate, expedient, and in the public interest. Wheeling was held to be such an appropriate order.

The FPC has also ordered compulsory wheeling of electric power under Section 202(c) of the Federal Power Act. 16 U.S.C. § 824a(c) (1970). In *Florida Power and Light Co. and Florida Public Service Co.*, 2 F.P.C. 991 (1941), the Commission used its wartime emergency powers under Section 202(c) to require an interconnection between the Florida Power and Light Company and the Florida Public Service Company. The order provided for the generation, delivery, interchange and transmission of electric energy between the two parties because of a power shortage in the southeastern area of the United States.

In a similar case, *Florida Power and Light Co. and City of Jacksonville*, 3 F.P.C. 712 (1942), the FPC used its emergency powers to order emergency interconnection and transmission. The Commission ordered Florida Power and Light to provide necessary switching equipment and a 66 kv transmission line to transport power to the City of Jacksonville, Florida. The order also stated that if Florida Power and Light were unable to provide power from its own facilities, Florida Power and Light must receive energy from

other sources and transmit and deliver the same to the City of Jacksonville.

These cases suggest that the Federal Power Commission may appraise too faintly its own potential power to order wheeling where necessary to abate violations of the antitrust laws. Nothing in the text of the Act, or, so far as we have found, in its legislative history, deprives the Commission of this particular antitrust remedy, whatever may be the intended limitations on its authority to order wheeling for other reasons.

If, on the other hand, this Court agrees with the Commission's disparagement of its power to order wheeling to remedy antitrust violations, the Commission's argument for its primary jurisdiction in this antitrust case disappears in a puff of smoke.

III. The Make-Weight Argument, That Compulsory Wheeling Is The One Antitrust Remedy Which Is Contrary To The Policy Of Congress, Is Wholly Without Merit

Appellant argues that it is against the policy of Congress to compel wheeling of power. Two congressional precedents are cited: (1) the legislative history of the Federal Power Act, and (2) the Keating amendment to annual Reclamation Bureau appropriation bills.[25]

Neither is in point.

If there is anything in the legislative history of the Federal Power Act that restricts the courts' jurisdiction under the antitrust laws to correct abuses of monopoly power by injunctions against refusals to wheel, the Commission has not cited it, and we have not found it. Moreover, if that legislative history is read as re-

[25] *E.g.*, Pub. L. 92-134, 92d Cong. (1971).

stricting the Commission's own jurisdiction to correct abuses of monopoly power to a level of authority less than that of the courts in the enforcement of the Sherman Act, then the case for rejecting the Commission's claim for primary jurisdiction in antitrust cases becomes unanswerable.

As to the Keating amendment:

This amendment, which has appeared in all Reclamation Bureau appropriation acts for many years, provides:

> ". . . That no part of this appropriation shall be used to initiate the construction of transmission facilities within those areas covered by power wheeling service contracts which include provision for service to Federal establishments and preferred customers, except those transmission facilities for which construction funds have been heretofore appropriated, those facilities which are necessary to carry out the terms of such contracts or those facilities for which the Secretary of the Interior finds the wheeling agency is unable or unwilling to provide for the integration of Federal projects or for service to a Federal establishment or preferred customer." Pub. L. 92-134, 92d Cong. (1971).[26]

Of course, as the Keating amendment says, agreed wheeling contracts are preferable to more expensive and controversial means of getting federal power to federal preference customers.[27] But if the only utility

[26] As is well known, this provision has been inserted in appropriations bills on the insistence of the private power industry, as a defense against construction of federal transmission lines.

[27] Since Appellant and its amici have thought it appropriate to raise the issue of general congressional policy, it may be appropriate to point out that the injunction against refusal to wheel

possessing the necessary transmission facilities refuses to even discuss a wheeling contract, what shall be the result: A company's veto power, precluding wheeling, notwithstanding the policy of the Keating amendment? Or an invocation by the municipality of the jurisdiction of the Federal Power Commission, to be met by the Commission's assertion that it has no statutory authority to compel wheeling? Or an appeal to the federal courts, which do possess equitable powers to enjoin misuse of monopoly powers over transmission?

Congress, in enacting the Keating amendment with its endorsement of wheeling arrangements, did not intend to displace the authority of the courts or the Commission to order wheeling to end the predatory antitrust practices of a company possessing a monopoly over transmission facilities, or to lodge in the offending company a veto power over the exercise of that remedy.

CONCLUSION

The judgment below should be affirmed. Nothing in the Federal Power Act precludes a federal court from enjoining a utility's refusal to "wheel" power to a municipality from another generating source over an interconnection ordered by the Federal Power Commission, in circumstances which would constitute a violation of Section 2 of the Sherman Act by that utility in the misuse of its monopoly, absent the asserted shield of the Federal Power Act.

---

has the additional justification that it implements the congressional policy expressed in the Flood Control Act of 1944 and some 15 other federal statutes, which provide that preference in the sale of power generated at power projects under the control of the Secretary of the Interior should be given to public bodies and cooperatives. Statutes cited note 1 *supra*.

The Federal Power Commission is in error in believing that it lacks authority to require a utility to "wheel" power over an interconnection ordered by the Commission, in circumstances where such a "wheeling" order is required to prevent that utility's misuse of its monopoly in violation of Section 2 of the Sherman Act.

The existence of this collateral authority in the Federal Power Commission, mistakenly disavowed by the Commission, does not affect the primary jurisdiction of the federal courts to enforce the Sherman Act by injunctions against refusal to "wheel."

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September 21, 1972

APPENDIX A

		Total Utility Operating Revenues Dollars	Net Income Dollars	Total Utility Operating Revenues as % of 1940 Base	Net Income as % of 1940 Base
U. S. Total Classes A and B Companies	1940	2,796,602,568	547,663,840	100.0	100.0
	1950	5,527,537,000	821,943,000	197.7	150.1
	1960	11,919,501,359	1,783,067,657	426.2	325.6
	1970	23,127,940,000	3,407,525,000	827.0	622.2
Southern California Edison Company	1940	46,393,848	12,179,772	100.0	100.0
	1950	104,593,323	19,018,005	225.4	156.1
	1960	305,798,657	50,979,532	659.1	418.6
	1970	720,968,905	127,494,501	1,554.0	1,046.8
Montana-Dakota Utilities Company	1940	4,969,574	1,009,974	100.0	100.0
	1950	14,344,341	2,067,285	288.6	204.7
	1960	31,678,776	4,620,106	637.5	457.4
	1970	55,421,693	8,750,118	1,115.2	866.4
Otter Tail Power Company	1940	3,257,761	602,672	100.0	100.0

	1960	63,255,415	12,163,463	1,092.6	1,425.0	
	1970	158,893,017	30,768,259	2,744.4	3,604.6	
...get Sound Power & Light Company	1940	14,915,384	1,659,493	100.0	100.0	
	1950	26,636,329	4,270,558	178.6	257.3	
	1960	37,137,307	7,466,117	249.0	449.9	
	1970	86,682,319	13,044,799	581.2	786.1	
Alabama Power Company	1940	22,499,578	3,019,634	100.0	100.0	
	1950	50,007,396	9,474,730	222.3	313.8	
	1960	126,071,655	21,802,619	560.3	722.0	
	1970	249,713,910	41,592,636	1,109.9	1,377.4	
Kentucky Utilities Company	1940	9,885,868	1,762,124	100.0	100.0	
	1950	22,864,694	3,827,566	231.3	217.2	
	1960	47,271,886	8,084,773	478.2	458.8	
	1970	83,590,829	14,757,521	845.6	837.5	

SOURCES:

Dollar figures from: 1) *Statistics of Electric Utilities in the United States, 1940: Classes A and B Privately Owned Companies;* 2) *Statistics of Electric Utilities in the United States, 1950: Classes A and B Privately Owned Companies;* 3) *Statistics of Electric Utilities in the United States, 1960: Privately Owned;* and 4) *Statistics of Privately Owned Electric Utilities in the United States, 1970.*

Percentages: Calculated by APPA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-691

OTTER TAIL POWER COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the District of Minnesota

BRIEF FOR CITY OF GAINESVILLE, FLORIDA, AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-991

OTTER TAIL POWER COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the District of Minnesota

BRIEF FOR CITY OF GAINESVILLE, FLORIDA, AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

This brief is filed on behalf of the City of Gainesville, Florida ("the City"), as amicus curiae in support of the Government and the Court below. The brief is filed pursuant to Rule 42(4), and is sponsored by Osee R. Fagan, City Attorney, who is the "authorized law officer" of the City within the meaning of that Rule.

We file this amicus brief out of concern for the far-reaching impact this case could have upon the efforts of small isolated utilities to interconnect with the major grid systems. We note, in this connection, that amicus was appellant in *Gainesville Utilities Dept. v. Florida Power Corp.*, 402 U.S. 515 (1971), where

this Court sustained an Order of the Federal Power Commission compelling Florida Power Corporation to interconnect with the City. We are also concerned with the possible impact of this case upon the City's pending treble damage suit against the Florida Power Corporation and Florida Power & Light Company for withholding an interconnection in violation of the Sherman Act.[1] The relation between the City's litigation with the major Florida utilities and the instant case is attested by the repeated references to such litigation in the Brief for Appellant Otter Tail Power Company.[2]

This amicus brief will not attempt to explore all of the issues raised on appeal. We will not address ourselves, for example, to Otter Tail's argument that, by some strange alchemy, Congress' reluctance to impose a wheeling requirement as part of federal regulatory policy has been transformed into a determination that a refusal to wheel can never be held to violate the antitrust laws. We will deal only with the following questions.

1. Have the antitrust laws been superseded and impliedly repealed with respect to the sale or exchange of energy through an interconnection by §202 of the Federal Power Act, 16 U.S.C. §824a? *See* Otter Tail Brief at 25–45.

2. Do the nature of the utility industry and the

[1] *Gainesville Utilities Dept. and City of Gainesville, Florida* v. *Florida Power Corp. and Florida Power & Light Co.*, No. 68-305-Civ. J. (M.D. Fla.).

[2] We will have occasion in the ensuing discussion to refer to the briefs filed by appellant Otter Tail and the Federal Power Commission as amicus in support of Otter Tail. These will be cited as "Otter Tail Brief" and "Commission Brief," respectively.

regulatory scheme in Part II of the Federal Power Act require a relaxation of the antimonopoly strictures in §2 of the Sherman Act, 15 U.S.C. §2? *See* Otter Tail Brief at 69–83.

3. Is an allocation of customers or territories between competing utilities in connection with a contract for wheeling electric power saved from condemnation as a per se violation of §1 of the Sherman Act, 15 U.S.C. §1, by the "ancillary restraint" doctrine? *See* Otter Tail Brief at 78–81.

We respectfully submit that each of these questions should be answered in the negative.

SUMMARY OF ARGUMENT

1. The argument that the antitrust laws have been superseded and impliedly repealed by §202 of the Federal Power Act with respect to the sale or exchange of energy through an interconnection will not wash. To begin with, contrary to Otter Tail's assertion, the lower court did not hold that the Sherman Act imposed an absolute duty to deal upon utilities. Its determination that Otter Tail had violated the antitrust laws was based upon the monopolistic motivation behind the latter's refusals to deal. Nothing in §202 conceivably could be read as sanctioning Otter Tail's conduct in this regard since, under no possible view of the statute, could it be read as recognizing a monopolistic motivation as a legitimate reason for refusing to deal.

Indeed, both the legislative history and statutory scheme show that Congress did not intend in §202 to place any limitations upon interconnection dealings. On the contrary, the purpose of the statute was to encourage negotiated interconnections and, by conferring upon the Commission a limited power to compel inter-

connection, insure that essential interconnections would not be left entirely to private agreement. Otherwise, the subject was left where it had been, *i.e.*, within the realm of private dealings. Congress, moreover, specifically contemplated that the antitrust laws would continue to apply to the electric utility industry.

2. The argument that the principles of law developed under §2 of the Sherman Act must be diluted and relaxed in their application to the electric utility industry depends largely upon distorting the holding below and the impact of §2 principles upon the industry. Thus, the contention that antitrust will overturn normal, non-predatory business activities is based, in the final analysis, upon a failure to distinguish between a monopoly position that results from sound business practices and one that is willfully and consciously sought or maintained by virtue of economic leverage. In the same vein, the attack upon the lower court's decision as imposing an absolute duty to deal is premised upon disregarding the monopolistic motivation underlying Otter Tail's conduct.

The argument fails, moreover, to include in the equation certain congressionally ordained policies that may benefit so-called "government power." Indeed, Otter Tail seeks to neutralize these very policies by arguing that yet another congressionally ordained policy—the antitrust laws—also be neutralized.

Otter Tail also seeks to support its "relaxation" argument by isolating each element of the case and examining it in a vacuum. The District Court, of course, was faced with and ruled upon the totality of Otter Tail's conduct.

3. Finally, the customer and territorial allocations contained in Otter Tail's wheeling contracts with the Bureau of Reclamation and certain coops cannot be justified on the "ancillary restraint" doctrine. The doctrine applies only where the restrictive covenant is required to preserve to the beneficiary of the covenant the benefits or corpus of the main transaction. Where, as here, such a covenant is imposed upon the purchaser of the goods or services, it does not perform this function since the seller is completely protected by being able to exact a fair price for his product. Indeed, imposing a restrictive covenant upon the purchaser can only result in diminishing the price, thereby underscoring the fact that the purpose of the restraint is anticompetitive rather than ancillary.

ARGUMENT

I. SECTION 202 OF THE FEDERAL POWER ACT DOES NOT IMPLIEDLY REPEAL THE ANTITRUST LAWS

Otter Tail's argument, in which it is joined by the Commission, is one of the more audacious "implied repeal" arguments ever urged upon this Court. They argue that the antitrust laws have been superseded totally with respect to dealings through interconnection by §202 of the Federal Power Act, 16 U.S.C. §824a.[3] This supersession has been accomplished, moreover, not by any express provision in §202, for there admittedly is none, nor by any action taken by the Commission pursuant to the regulatory statute.[4] It has been accomplished by virtue of the mere existence of the regulatory scheme.

[3] *But see* the assertions in the Commission's amicus brief that it challenges *only* the injunctive relief ordered by the District Court. Commission Brief at 5, 13, 15.

[4] The only Commission action has been to compel Otter Tail to interconnect with one of the municipalities involved.

The nature of the argument is somewhat obscured by use of the term "primary jurisdiction,"[5] a rubric that may convey any of a number of concepts. *See, e.g.*, L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 121, 122 (1965) (hereafter "Jaffe"). Neither Otter Tail nor the Commission are contending merely that the antitrust proceeding should have been stayed pending preliminary resort to the agency for resolution of some issue under the regulatory statute the determination of which is incidentally involved in the antitrust litigation. *Cf. General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940). *See* Jaffe, *supra* at 122. And, of course, aside from the issue of implied repeal, resolution of the antitrust questions does not require any prior determination of Federal Power Act issues committed to the jurisdiction of the Commission.

Otter Tail is arguing, quite simply, that §202 of the Federal Power Act supersedes and impliedly repeals the antitrust laws with respect to dealings between utilities through an interconnection. We do not believe that either the statutory scheme or the controlling precedents support the argument.

A. The Law of Implied Repeal

This Court has articulated repeatedly the requisites for finding an implied repeal and supersession of the antitrust laws, beginning with the overriding principle

[5] The Commission uses the formulation throughout its brief. Otter Tail, on the other hand, seems to have abandoned the "primary jurisdiction" terminology in its brief after having employed it in its Jurisdictional Statement. *See* Jurisdictional Statement at 14, 16. The Jurisdictional Statement cited essentially the same cases upon which Otter Tail relies in its brief. *Compare* Jurisdictional Statement at 14-17 *with* Otter Tail Brief at 26-30.

that "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 351 (1963).

It surely is not enough that "Congress has created a specific regulatory scheme to deal with" the particular subject matter. Otter Tail Brief at 26; *Id.* at 31. The existence of the regulatory scheme at most gives rise to the issue of implied repeal; it does not provide the answer. Note, for example, the numerous instances in which this Court has held that a specific regulatory scheme did not oust the antitrust laws even though the coverage may have been quite extensive. *E.g., Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217–18 (1966) (Shipping Act); *United States* v. *Borden Co.*, 308 U.S. 188, 198–99 (1939) (Agricultural Marketing Agreement Act). In *United States* v. *Philadelphia National Bank*, for example, this Court rejected the supersession argument even while noting that "governmental controls of American banking are manifold," and "Federal supervision of banking has been called '[p]robably the outstanding example in the federal government of regulation of an entire industry through methods of supervision. ***' " 374 U.S. at 327, 330.

The real question in each instance is whether there is such a clear and positive repugnancy between the provisions of the regulatory statute and those of the antitrust laws as to manifest a congressional intent to supersede and repeal the latter. *United States* v. *Borden Co., supra*, 308 U.S. at 198–99. *Accord*: *United States* v. *Philadelphia National Bank, supra*, 374 U.S. at 350–51; *State of Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 456–57 (1945). Even positing such a definite

repugnancy, the antitrust laws will not be held to have been superseded generally, but *only* to the extent of the repugnancy. *United States v. Borden Co., supra*, 308 U.S. at 199; *State of Georgia* v. *Pennsylvania R.R., supra*, 324 U.S. at 457. In short, the operation of the two statutes should be reconciled "rather than holding one completely ousted," and repeal will be implied "only to the minimum extent necessary" to make the regulatory statute work. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). "This is the guiding principle to reconciliation of the two statutory schemes." *Ibid. Accord: United States* v. *Borden Co., supra*, 308 U.S. at 198–99.

B. The Statutory Scheme and the Scope of the Regulatory Jurisdiction

Section 202 of the Federal Power Act, 16 U.S.C. §824a, provides, in relevant part:

> (a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy. . . . It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. . . .
>
> (b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appro-

priate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangenment to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

* * *

Thus, subsection (a) directs the Commission "to promote and encourage" interconnection between utilities, while (b) does not stop at voluntary action but empowers the Commission to compel the sale or exchange of energy if it "finds such action necessary or appropriate in the public interest," and if the other requirements of the statute are met.

As we have noted, there is nothing in the provision that expressly repeals the antitrust laws. Since Congress has shown a decided ability to spell out in clear language its desire that regulatory legislation supersede the antitrust laws,[6] the absence of equivalent

[6] *See, e.g.*, 49 U.S.C. §1384 (Federal Aviation Act); 49 U.S.C. §§5(11), 5b(9) (Interstate Commerce Act); 46 U.S.C. §814 (Shipping Act); 7 U.S.C. §608b (Agricultural Marketing Agreement Act). *Compare* Clayton Act, §7, 15 U.S.C. §18.

language here suggests that Congress saw no conflict between §202 and the antitrust laws.

Nor is there anything in the legislative history suggesting an intention to supersede the antitrust laws. Quite to the contrary, the available data supports the view that Congress envisioned the continued vitality and applicability of the antitrust laws and wished merely to supplement the antitrust regime with regulatory supervision.

Section 202 was enacted as part of the Public Utility Act of 1935, 49 Stat. 803–863. Title I of the Act contained the provisions of the Public Utility Holding Company Act of 1935,[7] currently 15 U.S.C. §§79–79z–6, while Title II amended the Federal Water Power Act of 1920 in certain respects, redesignated it as Part I of the "Federal Power Act," and added Parts II and III to the Act.[8] Section 202 was included in Part II. *See* §213, 49 Stat. 847.

Contention over the legislation centered upon the holding company provisions, with both proponents and opponents of the legislation explicitly recognizing that the antitrust laws applied to the electric utility industry. The argument was not over their applicability, but rather whether they were being applied with sufficient vigor. Thus, in the Senate debate, Senator Wheeler, the sponsor of the Bill, said with specific reference to the holding company provisions:

> When Congress enacted the Sherman Antitrust Law everyone said, "Now, we have stopped the trusts and monopolies and combinations"; but they were not stopped; they have gone on, have

[7] §§1–33, 49 Stat. 803–838.
[8] §§201–13, 49 Stat. 838–863.

> flourished. As a matter of fact, if the Sherman Antitrust Law had been enforced and executed and upheld as Congress intended it should be upheld and as the Congress had it in mind at the time they passed the law, I do not think there would have been much question that holding companies could not have been organized. But gradually the Sherman Law has been whittled away. That is what has been sought by the representatives of the holding companies and representatives of the utility companies with regard to this holding company bill—to whittle it down, and whittle it down, so that it will not be effective when it is put upon the statute books. If they had to accept any regulatory statute at all, they wanted to make sure that it would be a harmless and ineffective one. 79 CONG. REC. 8392 (1935).

Senator King, in opposition to the Bill, argued that it was unneeded precisely because the antitrust laws were available to remedy anticompetitive conduct:

> . . . But it is not even pretended that the holding-company measure before us is intended to deal with unlawful conspiracies in restraint of trade. It has not been asserted, and it will not be asserted, that that is the purpose of this bill; for, if that were true, the proponents of the measure would be at once overwhelmed with the devastating answer that the law is then wholly unnecessary, and the evil has already been taken care of, or can be taken care of, by the antitrust laws now upon the statute books. 79 CONG. REC. 8929 (1935).
>
> Mr. President, we need not a line of legislation, therefore, to show that the antitrust laws will apply to public-utility companies as well as to any other companies. . . . *Ibid.*

It is unlikely, to say the least, that the Congress, at one and the same time, intended to repeal the antitrust laws

with respect to interconnection dealings, particularly since there is not a word in §202 to suggest such an intent. Quite to the contrary, the proponents of the legislation were intent upon strengthening and supplementing antitrust strictures, while even the opponents specifically contemplated their continuing applicability.

The statutory scheme reflects this approach. The whole thrust of §202 is the "promotion and encouragement" of interconnection, the very objective for which the antitrust laws have been invoked in the instant case. In accordance with this objective, the Commission is directed to promote voluntary interconnections, but the statute imposes no requirement that the Commission approve interconnection arrangements. Indeed, the Commission is not even empowered to object to a negotiated interconnection even though it might not consider it to be in the "public interest." Thus, the field is left, for the most part, wholly outside the Commission's regulatory jurisdiction. Privately negotiated dealings are the rule; those passed upon by the Commission are the exception.

In line with this, the jurisdiction conferred upon the Commission is a very limited one, and exists solely for the purpose of removing impediments to interconnection dealings. Admittedly, the power conferred is not total. It is nonetheless clear that the congressional purpose was *not* to preclude certain types of interconnection dealings, for none are in fact precluded and the Commission has no authority even to object to a negotiated arrangement. The purpose manifestly was to maintain at least a minimum level of interconnection.

This scheme is, of course, entirely consistent with Congress' desire (*see supra*) to place additional checks,

over and above those resulting from the antitrust laws, upon the reluctance of private utilities to sell and exchange energy through interconnection.

C. The Alleged Repugnancies

Otter Tail's burden is to show that the decision below applying the antitrust laws to its activities is in some way repugnant to §202. As we have seen, the mere existence of a regulatory scheme to deal with a particular subject will not suffice to discharge this burden. *See p. 7, supra.*[9]

Much of Otter Tail's argument is predicated upon its characterization of the lower court's decision. According to Otter Tail, the District Court held that any refusal by a utility to deal at wholesale was a violation of §2 of the Sherman Act regardless of the basis for the refusal. For example:

> . . . the lower court held that the antitrust laws impose an absolute duty upon a utility to sell at wholesale in all cases, regardless of the circumstances. . . . Otter Tail Brief at 22.

And again:

> . . . In other words, in the lower court's view, a utility which is presented with a demand for wholesale service must always comply immediately and of its own accord. . . . *Id.* at 32–33.

With all respect, this distorts the holding below. The District Court found that Otter Tail refused to deal for the purpose of achieving and maintaining mo-

[9] There are any number of additional cases in which the existence of a specific regulatory scheme to deal with a particular subject matter was held not to oust the antitrust laws. In addition to the cases cited at p. 7, *supra, see California* v. *Federal Power Commission*, 369 U.S. 482 (1962) (Natural Gas Act); *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959) (Federal Communications Act).

nopoly power. The crux of the offense was the monopolistic motive and purpose. The Court said nothing about the consequences of a hypothetical refusal to deal not infected with a monopolistic motivation, for it was not faced with such a case.

The issue, therefore, is whether application of the antitrust laws to monopolistically motivated refusals to deal would be so clearly and definitely repugnant to the relevant provisions of the Federal Power Act that repeal of the antitrust laws is "necessary to make the [Federal Power Act] . . . work." *Silver* v. *New York Stock Exchange, supra,* 373 U.S. at 357.

Otter Tail appears to argue, in this connection, that the lower court's decree will result in interconnection dealings that would not necessarily pass muster under §202 because they would require enlargement of generating facilities or impair the company's ability to service adequately its customers. We note that none of the specific refusals to deal with which the lower court was concerned involved any of these factors. In any event, this argument is totally irrelevant to the lower court's substantive determination that Otter Tail's monopolistically motivated refusals to deal violate §2. Under no possible view could this determination be deemed inconsistent with anything in §202 since the latter, even if interpreted to legitimate a refusal based upon one or more of the factors specified therein, does not recognize a monopolistic motivation as a legitimate reason for declining to sell or exchange energy through an interconnection. To put it another way, a refusal to deal based solely upon the considerations specified in §202 would present no antitrust problem. It is only when one goes beyond these considerations, as did

Otter Tail, and declines to deal for monopolistic reasons that the refusal runs afoul of the antitrust laws. In short, any alleged conflict between §202 and the lower court's substantive determination is wholly illusory.

Thus, the argument in reality is directed solely at the form of relief ordered by the lower court—*i.e.*, the injunction. The argument depends, moreover, upon reading into §202 a congressional policy hostile to interconnections other than those that would be required thereunder. As we have seen, such a reading distorts completely what Congress has done. Section 202 was never intended to place limitations upon the sale or exchange of energy through interconnections; it was intended rather to insure, *as a matter of regulatory policy*, a "floor," or minimum level of interconnection. Accordingly, the statute articulates a policy of "promoting and encouraging" interconnection, does not contain any requirement of regulatory approval, and does not even authorize the Commission to object to negotiated interconnection arrangements. And to insure that the policy of "promoting and encouraging" interconnection will not be completely frustrated by private action, the Commission is given power to compel interconnection where it is deemed necessary rather than merely desirable. Beyond this, the matter was left, as are most matters in our economic life, to private action unattended by regulatory compulsion. To put it another way, aside from the limited power given to the Commission to compel interconnection dealings, they were to be left to the normal rules of the game including, of course, the antitrust laws.

In the same vein, §202's "public interest" regulatory standard for passing upon refusals to deal is entirely

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In the same vein, §202's "public interest" regulatory standard for passing upon refusals to deal is entirely

consistent with the continued application of antitrust. For example, such a regulatory test was involved in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959), and *California* v. *Federal Power Commission*, 369 U.S. 482 (1962), each of which presented a claim that the operation of the antitrust laws had been superseded with respect to transactions for which regulatory approval had been obtained. *Philadelphia* involved a bank merger that had been approved by the Comptroller of the Currency pursuant to the Bank Merger Act of 1960, 12 U.S.C. §1828; *RCA* involved an exchange of television licenses that had been approved by the FCC pursuant to §310(b) of the Federal Communications Act, 47 U.S.C. §310(b); *California* involved a pipeline acquisition that had been approved by the Federal Power Commission pursuant to §7 of the Natural Gas Act, 15 U.S.C. §717f(c). In each case, the subject matter of the transaction in question had been entrusted completely to the regulatory commission and its approval was specifically required. No room was left, as here, for private arrangements beyond the Commission's supervision. In each case, moreover, the regulatory commission, acting pursuant to a "public interest" criterion, was required by law to take into consideration the policies of the antitrust laws. Indeed, in *Philadelphia National Bank*, the Comptroller of the Currency was required by the Bank Merger Act to obtain from the Attorney General a report on the probable competitive effects of the merger before passing upon it. *See* 374 U.S. at 332. Despite the individual and cumulative effect of these factors, the Court in each case found that the antitrust laws had not been superseded by the regulatory statute with respect

to the matters specifically entrusted to the agency by the latter. Indeed, in *California* v. *Federal Power Commission,* the Court held that the agency should not even have passed upon the matter in view of the pendency of the antitrust action. *See* U.S. at 489-90.

The rationale of these cases is not difficult to grasp. The existence of a regulatory check upon private conduct in no way suggests that Congress intended to wipe out other checks aimed at somewhat different types of abuses. It is far more reasonable to believe, in the absence of a contrary expression of intent, that Congress intended both checks to continue to operate, particularly since they were not designed to get at identical problems even though there might well be some overlap.[10] And as we have seen, this was precisely what Congress had in mind when it passed §202, a purpose reflected throughout the statutory scheme.

Thus, the existence of a limited administrative remedy for particular conduct is in no way inconsistent with the continued vitality of antitrust remedies. Only when such a remedy is coupled with a power to immunize, a power conspicuously absent in §202, is there even a potential for conflict between a specific antitrust remedy—*i.e.,* the injunction—and later agency action conferring antitrust immunity. In such cases, the antitrust court *may*[11] defer to the agency in order to avoid any possibility of conflict between the Court's injunctive powers and subsequent agency immunization of the very conduct in question.

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[10] *I.e.,* the "public interest" includes, but is not limited to, antitrust laws.

[11] *See* Jaffe, *supra* at 150–51.

It is not, however, the existence of an administrative remedy that compels this result, but rather the existence of the immunization power, a power admittedly not present in the instant case. Were it not for the immunization power, which alone gives rise to the possibility of conflict, the administratve remedy would be deemed cumulative. This is shown by the fact that other antitrust remedies (*i.e.,* criminal prosecution, damage actions, and broader injunctive relief) remain fully applicable since the possibility of subsequent immunization is irrelevant to their application. For example, in *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966), the Court sustained a private triple damage action even though the Shipping Act empowered the agency to immunize the combination under attack and provided both cease and desist and reparations remedies for conduct not immunized by the agency. Similarly, in *United States* v. *Borden Co., supra,* 308 U.S. at 204–06, the criminal provisions of the Sherman Act were held applicable to a dairy cooperative even though the Capper-Volstead Act, 7 U.S.C. §§291–292, gave the Secretary of Agriculture cease and desist powers against monopolization or restraint of trade by such organizations. *Accord: Maryland & Virginia Milk Producers Ass'n* v. *United States,* 362 U.S. 458, 462–63 (1960). Again, in *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296, 305, 309–10, 313 n. 19 (1963), the Court held that, even though the injunctive remedy under the antitrust laws did not lie in view of the CAB's authority to immunize or enjoin the conduct in question, other antitrust remedies survived.

Indeed, as *Carnation* shows, where the immunization power is irrelevant to a particular antitrust remedy,

the latter will remain fully applicable even though an equivalent remedy is contained in the regulatory statute. Thus, the damage remedy was left unaffected even though the Shipping Act provided plaintiff with a damage remedy for the very conduct in question.

We note parenthetically that how far compulsion should go as a matter of federal regulatory policy is, of course, a different question from how far it should go as a matter of antitrust policy. The latter poses an issue regarding the scope of the relief ordered by the lower court. In other words, having found that Otter Tail refused to deal through an interconnection for the purpose of achieving and maintaining monopoly power, may a District Court go beyond the specific violations and, in order to assure effective relief, prohibit Otter Tail from refusing to deal even in circumstances where, aside from the violation, Otter Tail might not be compelled to do so? While the scope of relief is beyond the scope of this brief, there would seem to be no question of the propriety of the lower court's approach. As this Court noted in *United States* v. *Loew's, Inc.*, 371 U.S. 38, 53 (1962):

> Some of the practices which the Government seeks to have enjoined with its requested modifications are acts which may be entirely proper when viewed alone. To insure, however, that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined. . . . When the Government has won the lawsuit, it is entitled to win the cause as well. . . .

The cases upon which Otter Tail primarily relies are not opposed to the analysis suggested here.

In *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156

(1922),[12] a shipper brought a damage action alleging that a number of railroads had conspired to fix rates higher than those previously charged. The rates in question had been approved by the Interstate Commerce Commission in a proceeding instituted by Keogh. The Court held that Keogh's action would not lie even though the rate-fixing combination violated the Sherman Act. The Court concluded that Congress, in order to effectuate a policy of uniform treatment of shippers and the prevention of discrimination, had specifically directed that the legality of rates was to be determined *solely* by the provisions of the Interstate Commerce Act.

> . . . The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. . . . 260 U.S. at 163.

To allow recovery in an antitrust action "for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed" would, in effect, give the prevailing shipper a rebate. This would "operate to give him a preference over his trade competitors" and destroy the uniformity mandated by Congress since, even if other shippers also sued, there was no assurance that "the several juries and courts" would give "each the same measure of relief". *Ibid.*

The *Keogh* Court, in short, viewed the case as an instance "of plain repugnancy between the antitrust and regulatory provisions," *United States* v. *Philadelphia National Bank, supra,* 374 U.S. at 351 n. 29,

[12] *See also Terminal Warehouse Co.* v. *Pennsylvania R.R.,* 297 U.S. 500 (1936).

since application of the antitrust laws would have upset the uniform rate policy expressly mandated by Congress in the Interstate Commerce Act. Conversely, applying the antitrust laws in the instant case does not require undoing anything mandated by the Act or the Commission. It works, in fact, to further the congressional policy of "promoting and encouraging" dealing through interconnection. The statutory schemes are complementary rather than antithetical.[13]

It should be noted that *Keogh's* vitality is highly suspect after *Carnation Co.* v. *Pacific Westbound Conference, supra.* That case also involved a damage claim under the antitrust laws arising out of a rate-fixing combination. Defendants relied on the *Keogh* holding that a treble damage recovery would be equivalent to a rebate and would thereby conflict with the Shipping Act's requirement of equality of treatment among shippers. The Court, however, rejected the argument on the ground that Congress had not been concerned:

> . . . with equality of treatment by juries in collateral proceedings. There is no reason to believe that Congress would want to deprive all shippers of their right to treble damages merely to assure that some shippers do not obtain more generous awards than others. 383 U.S. at 219 n. 3.

As we already have noted (*see* pp. 17-18 *supra*), *Pan American World Airways, Inc.* v. *United States, supra,* is an example of possible conflict between the regulatory scheme and a particular antitrust remedy. The Government was denied injunctive relief against alleged violations of the antitrust laws relating to allocation of routes, division of territories, and the affiliation of common and air carriers. The Court noted that the

[13] As the Court pointed out in *United States* v. *Radio Corporation of America, supra,* 358 U.S. at 346–48, the Keogh rationale is limited to the rate structures of common carriers.

actions constituting the alleged violations "are basic to this regulatory scheme" and "are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers." *Id.* at 305. The Act, moreover, specifically provided that antitrust immunity was to attach to the extent necessary to permit compliance with certain of the Board's orders. Thus, "in case of a prospective application of the Act, the Board's order, as noted, would give the carrier immunity. . . ." *Id.* at 309. Were the antitrust court to enjoin what the agency subsequently might condone, the "two regimes might collide." *Id.* at 310.[14]

The Court recognized (*e.g.*, 371 U.S. at 313 n. 19), that this approach was called for by *Far East Conference* v. *United States*, 342 U.S. 570 (1952), and *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932), cases also cited by Otter Tail. In each, the Shipping Board's apparent power to immunize rate agreements was held to oust temporarily[15] the injunctive remedy under the antitrust laws because of possible conflict between an injunction and a later Board order immunizing the same conduct.[16]

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[14] *Cf.* Jaffe, *supra* at 150:

> . . . Thus, insofar as the alleged illegal conduct has been immunized or approved as an inherent component of route certifications, the antitrust laws are no longer applicable, and insofar as it can be the subject of a cease-and-desist order, an injunction under the antitrust laws is unnecessary and might set up a confusing conflict with CAB regulatory policy.

[15] The Court specifically recognized in *Far East* that the injunction action could be revived, if appropriate, after the Board had acted. 342 U.S. at 577.

[16] *See* the explication of *Far East* and *Cunard* in *Carnation Co.* v. *Pacific Westbound Conference*, *supra*, 383 U.S. at 220–21.

Pan Am also involved questions relating to "air routes to and in foreign countries," the resolution of which "may involve military and foreign policy considerations that the [Aviation] Act . . . subjects to presidential rather than judicial review." 371 U.S. at 310. Indeed, the lower court had found that the violations alleged had been promoted and approved by the State Department in the course of administering the nation's foreign policy. *See Id.* at 299 n. 4. Thus, the antitrust action presented the potentiality for conflict, not merely with the regulatory agency, but also with the executive's constitutionally-conferred authority to conduct the nation's foreign policy.[17]

We think it should be emphasized, in closing, that the lower court has shown considerable regard for the Commission's regulatory authority in formulating its decree. Section V of the Amended Judgment provides that wholesale dealings may be required of Otter Tail only "at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission." We submit, with all respect, that this provision adequately protects the Commission's limited function in respect to the sale or exchange of energy through interconnection. It permits the Commission to bring to bear whatever regulatory wisdom it may have in connection with working out the "terms and conditions," including

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[17] *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965), also cited by Otter Tail, held that judicial review of a decision by the Federal Reserve Board was confined to the statutory review procedures contained in the Bank Holding Company Act, 12 U.S.C. §1848. We are, quite frankly, at a loss to understand how Otter Tail is aided by this decision dealing with the proper channel for judicial review of administrative action.

compensation, of each interconnection arrangement. This represents precisely the kind of flexible accommodation between antitrust and regulatory policy that the "primary jurisdiction" concept is designed, but often fails, to achieve.

II. NO RELAXATION OF THE ANTIMONOPOLY STRICTURES OF §2 OF THE SHERMAN ACT IS EITHER REQUIRED OR JUSTIFIED

The District Court found Otter Tail guilty of both attempting to monopolize and actually monopolizing in violation of §2. Otter Tail seeks to escape both determinations by arguing that §2 must be diluted and modified in its application to the electric utility industry.

Otter Tail's argument against full-strength application of §2 depends largely upon grossly distorting §2's impact upon the industry. Application of §2 will not "supersede the regulatory scheme of Section 202(b)" of the Federal Power Act (Otter Tail Brief at 69), "reverse Congress' determination that involuntary wheeling will not be compelled" (*Ibid.*), forbid "a utility to take any action to preserve or expand its system to meet the needs of the public" (*Id.* at 71), make it "unlawful . . . for Otter Tail to defend itself against . . . ouster" by a municipality (*Id.* at 72), require a utility "which is in the business of selling at retail [to] sell at wholesale to its competitors or former retail customers" (*Id.* at 78), or nullify "congressional objectives relevant to electric utilities" (*Id.* at 81).

In the first place, the "congressional objectives relevant to electric utilities" are not, as Otter Tail seems to assume, expressed exclusively in the Federal Power Act. The antitrust laws, too, represent congressional statements of "fundamental national economic policy."

United States v. *Philadelphia National Bank*, 374 U.S. 352, 372 (1963). And the Public Utility Holding Company Act of 1935, 15 U.S.C. §79a et seq., as interpreted in *Securities and Exchange Commission* v. *New England Electric System*, 384 U.S. 176 (1966), 390 U.S. 207 (1968), is a clear expression of congressional intent that "free and independent competition" is the Government's policy vis-a-vis public utility corporations' dealings with each other.

Second, there is nothing irrational or incongruous about applying traditional §2 Sherman Act concepts to any "natural monopolies" that purely economic or regulatory forces conceivably might create in the electric utilities industry. If there be any such animals, they will be left undisturbed, for no dominant enterprise in any industry is guilty of a §2 violation if its monopoly is "thrust upon it." *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945). The District Court's predication of its monopolization findings on Otter Tail's willful quest for and maintenance of monopoly power was a recognition of established §2 precedents, not of "the patent absurdity of applying the Sherman Act to condemn a monopoly conferred by state or local grant" (Otter Tail Brief at 69). All we need do is change the type of "natural monopoly" from some sort of utility franchise to a Federally-conferred patent and the fallacy of Otter Tail's argument becomes apparent. "[T]he possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly." *United States* v. *Line Material Co.*, 333 U.S. 287, 308 (1948). Accordingly, local retail utility monopolies cease to be "natural" in any sense of the word as soon as con-

tinuation of their monopoly position becomes dependent upon the utility's use of economic leverage, as opposed to improved service and reduced rates.

Otter Tail's violation of §2 consisted of an aggregation of three trade-restraining activities—its refusal to sell wholesale power to, or wheel power for, municipalities it has served at retail; its conducting or sponsoring lawsuits designed to block sale of municipal bond issues and thereby prevent the establishment of municipal systems;[18] and its invocation of restrictive provisions in its contracts with the Bureau of Reclamation and various rural electric cooperatives. While the wheeling contracts' restrictive provisions could violate §1 of the Sherman Act standing alone, only the intent or purpose for which they were adopted renders the other activities unlawful.

Otter Tail objects to the District Court's application of the Sherman Act "to an electric utility as though it were dealing with a tobacco company or shoe manufacturer." Otter Tail Brief at 69. Yet Otter Tail and the other utilities supporting its appeal disavow any claim of antitrust exemption or implied repeal of the antitrust laws. Their reluctance to state outright that they are claiming repeal, express or implied, is understandable in light of the Federal Power Act's complete

[18] Otter Tail's brief attempts, at pages 65 and 68, to strengthen its argument for a "political activity" exemption by lumping its activity in municipal elections with its litigation in opposition to municipal bond issues. But the Government never asked for, and the District Court never made, a ruling that the election activity, either alone or in aggregation with Otter Tail's other conduct, is a violation of the Sherman Act. Evidence of the election activity was offered and admitted solely on the issue of intent. *See United Mine Workers* v. *Pennington*, 381 U.S. 657, 670 n. 3 (1965).

silence on the subject and of this Court's attitude toward implied repeals. *See* discussion in Part I, *supra.*

In fact, however, the utilities have merely clothed the implied repeal argument in new dress. When they contend that the District Court's application of the Sherman Act disregards "congressional objectives relevant to electric utilities" (Otter Tail Brief at 81), and that regulated monopoly has been substituted for competition as a matter of government policy" (Brief for Amici Curiae, General Public Utilities Corp., et al. at 14), they are asserting a "plain repugnancy" between the Sherman Act and the Federal Power Act and asking that the latter prevail.

No other interpretation can be put, moreover, on the utilities' opposition to use of what they characterize as a "per se rule" in applying §2 of the Sherman Act to electric utilities. Otter Tail Brief at 83. Only an implied partial repeal of §2 would support a "rule of reason" for monopolization of electric power. The rule of reason is an offshoot of the Sherman Act's §1 ban on restraints of trade. It has nothing to do with §2, since monopolization and attempts to monopolize are banned by §2 without regard to the "reasonableness" of the monopoly achieved or attempted:

> Although in many settings it may be proper to weigh the extent and effect of restrictions in a contract against its industrial or commercial advantages, this is never to be done when the contract is made with intent to set up a monopoly. As much was plainly implied in *Swift & Co.* v. *United States*, 196 U.S. 375, 396 . . . where the court spoke of monopoly as being the "result" which the law seeks to prevent; and, although the language on pages 60 and 61 of *Standard Oil Co.* v. *United States*, 221 U.S. 1 . . . is not altogether

> clear, it seems to presuppose as a premise that a monopoly is always an "unreasonable restraint of trade." L. Hand, J., in *United States* v. *Aluminum Co. of America, supra,* 148 F.2d at 428.

Otter Tail misconstrues *Alcoa* when it says that its application to utilities "would make it an antitrust violation for a utility to take any action to preserve or expand its system to meet the needs of the public." Otter Tail Brief at 71. The case says nothing of the sort, as the Report of the Attorney General's National Committee to Study the Antitrust Laws recognized. After quoting Judge Hand's statement that "we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel," 148 F.2d at 431, the Report notes:

> This statement, specifically approved by the Supreme Court in the *American Tobacco* case (328 U.S. 781, 814 (1946)), is sometimes misconstrued to suggest that 'monopoly' may become 'monopolization' merely by being active, enterprising, and dynamic. This construction implies that the safest course for large companies is passive stagnation, with a gradual loss of market share—a business policy directly at odds with antitrust aims. Such is not the teaching of *Alcoa.* Defendants' conduct was there held to constitute 'monopolization' not because Alcoa was progressive, but rather because it acted with calculation to head off every attempted entry into the field. That history of frustrating potential entrants and the vital fact that no company succeeded in breaking into a basic manufacturing industry, whose technology was widely known, over a period of more than 25 years, while Alcoa's output increased 800 per-

cent, convinced the Court, as a practical matter, that Alcoa's monopoly position rested on a good deal more than its technical and business skill. The *Alcoa* case is not to be interpreted as penalizing enterprise; instead it declares illegal monopoly maintained by policies intended to discourage, impede or even prevent the rise of new competitors. Report of the Attorney General's National Committee, 60 (1955).

Third, it is simply not true that the District Court's decision imposes upon electric utilities an absolute obligation to wheel power or to sell it at wholesale. The decision cannot be read as requiring a utility to provide wheeling services and wholesale power if its refusal so to do is motivated solely by, for example, a desire to avoid overloading its system or by the unwillingness of the utility requesting service to absorb additional expense or investment occasioned by the service required. The refusal is lawful as long as it is prompted by business considerations not related to perpetuating, extending, or otherwise synthesizing a monopoly that is about to expire or shrink or has become too confining. This is hornbook law.

Indeed, it may even be that a utility could refuse, as a matter of general business policy, to engage in any wheeling for other systems or in the sale of power for resale, limiting its business to retail transactions with consumers. But Otter Tail has no such general business policy. Rather, that company has been perfectly willing to wheel power—including federal power—and to sell at wholesale whenever it serves Otter Tail's purposes to do so. The vice in this method of doing business, as the District Court properly saw it, is that Otter Tail's choices of those with whom it will and will not deal are designed—and concededly so—to block

the establishment of competing systems. A tobacco company or shoe manufacturer (to use Otter Tail's examples), has "independent discretion as to parties with whom he will deal" *only* "in the absence of any purpose to create or maintain a monopoly." *United States v. Colgate & Co.*, 250 U.S. 300, 308 (1919). Electric utilities have no greater rights in this area.

For this reason, Otter Tail misses the mark with its elaborate review of the Federal Power Act's legislative history to account for the absence of a wheeling requirement. To distinguish an electric utility from a tobacco company or shoe manufacturer for antitrust purposes, Otter Tail must show more than the fact that the utility is not statutorily *required* to render a service it voluntarily performs for some customers, for neither is the tobacco or shoe company. It must show that the utility is *forbidden* to render that service. As long as the choice is freely Otter Tail's, its decision to enter the business of wheeling brings it within reach of the *Colgate* doctrine, *supra*.

Fourth, to the extent the present case involves "an interface between private power and the vastly advantaged, often unregulated and preferred government power" (Brief for 17 Investor-Owned Electric Utilities, Amici Curiae, at 8), the borrowing and tax advantages, freedom from regulation, and preferences enjoyed by government power are themselves government policies. The District Court's order is more consistent with these policies than the special dispensation the utilities seek under §2 of the Sherman Act. Since the Sherman Act is part of the national policy governing the electric utility industry (*see Pennsylvania Water & Power Co.* v. *FPC*, 343 U.S. 414 (1952)), its application does

not "alter," but is already part of, "the equilibrium between the government and private sectors of the power industry" (Brief for 17 Investor-Owned Electric Utilities, Amici Curiae, at 8).

The fact that it is the utilities who seek to alter that equilibrium is vividly illustrated by Otter Tail's conduct as related in the District Court's findings. Otter Tail did not refuse to wheel federal power when it was approached by the Bureau of Reclamation. On the contrary. Otter Trail wanted the benefits of using the Bureau's bulk power supply lines for power delivery and reliability and of purchasing economy energy and other types of low cost electric power from the Bureau. It was also undoubtedly aware that, under §5 of the Flood Control Act of 1944, 16 U.S.C. §825s, the Bureau has authority to build "only such transmission lines . . . as may be necessary" to market its power. Therefore Otter Tail was quite willing to cooperate. What it wanted, its arrangements with the Bureau make clear, is not the right to refuse to wheel federal power but the right to decide, to its own advantage, where and to whom federal power can be sold. An important effect of the decree being appealed from here is to terminate this private effort of Otter Tail's to subvert the "preference clause" in §5 of the Flood Control Act.

Otter Tail's insistence that the courts "consider the erosion and possible destruction of Otter Tail's business" (Otter Tail Brief at 82) is another attempt to secure judicial amendment of policies deliberately adopted by the legislature. If Otter Tail's system is to suffer attrition by reason of municipalities' freedom to choose public power, that attrition will not result from any unjust or irrational application of antitrust con-

cepts. Rather, it will result from local and state legislative policy decisions to give public utilities only temporary or limited-term franchises to conduct their businesses. Otter Tail wants the right to use the leverage of its monopoly power over subtransmission lines in its service area to add an element of permanence or security to its temporary franchise. And it wants the right to make this change in utility franchising without regard to the wishes of the legislature or electorate that has chosen to franchise it for limited terms. The only way a municipality could prevent Otter Tail from making its franchise a permanent one would be to follow Elbow Lake's lead and establish its own generation or to build its own transmission line to whatever bulk power source it intends to use.

The argument has been made before in regulated industries that certain conduct should escape traditional antitrust scrutiny "because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." But "a value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already. . . . Congress determined to preserve our traditionally competitive economy." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 371 (1963).

Respectfully, we urge the Court to consider the position the antitrust enforcement arm of the Federal Government has taken with regard to the interrelation of regulatory and competitive factors in the electric power industry:

> In industries with certain technical characteristics —such as the electric power industry—regulation may be both necessary and desirable to insure an efficient allocation of resources. But, competition

may still play an important role in assuring that such industries operate efficiently. After all, where there is regulation and no competition, firms may become lazy, for they feel that they are, in effect, guaranteed a profit. On the other hand, if regulated firms also face competition, they work harder to keep costs down, to improve the quality of their service, or to devote sufficient resources to research and innovation. Testimony of Hon. Donald F. Turner, Assistant Attorney General, July 13, 1966, Senate Commerce Committee Hearing on S-3136, 89th Cong., 2d Sess.

CUSTOMER AND TERRITORIAL ALLOCATIONS EMBODIED IN OTTER TAIL'S WHEELING CONTRACTS ARE PER SE VIOLATIONS OF §1

Otter Tail's reciprocal wheeling contracts with the Bureau of Reclamation and certain cooperatives also came under judicial scrutiny in the Court below. Pursuant to these contracts, Otter Tail and the contracting party agree to wheel power for one another, but not to purchasers who have been taking power from the wheeling party. In other words, the wheeling service is not available to enable the Bureau and coops to compete with Otter Tail to serve the latter's customers. The District Court held that these restrictive provisions "are, in reality, territorial allocation schemes," and hence, per se violations of §1 of the Sherman Act. *See United States* v. *Otter Tail Power Co.*, 331 F.Supp. 54, 63 (D. Minn. 1971).

Otter Tail challenges this holding. It argues that the arrangements are not customer or territorial allocations since any of the contracting parties who wishes to compete for the business held by Otter Tail may do so "by building its own lines or using those of a third party." Otter Tail Brief at 79. Otter Tail characterizes the restrictions as "ancillary to the purchase or use of another's property," and insists that such restrictions:

> . . . have never been held to violate the antitrust laws. On the contrary, the legality of such restrictions has been recognized in innumerable decisions both before and since the enactment of the Sherman Act. . . . *Ibid.*

The only Sherman Act case cited in support is *Tri-Continental Finance Corp.* v. *Tropical Marine Enterprises, Inc.*, 265 F. 2d 619 (5th Cir. 1959).

We do not intend to address ourselves to the propriety of the lower court's characterization of the arrangements as customer or territorial allocations even though Otter Tail appears to concede, as it must, that, positing the accuracy of the characterization, the arrangements constitute per se violations of §1. *See e.g., United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *Pennsylvania Water & Power Co.* v. *Consolidated Gas, Elec. Light & Power Co.*, 184 F. 2d 552, 558 (4th Cir.), *cert. denied*, 340 U.S. 906 (1950); *cf. Montana-Dakota Utilities Co.* v. *Williams Elec. Coop.*, 263 F. 2d 431 (8th Cir. 1959). We do note in passing, however, that, insofar as the contractual provisions tend effectively to exclude competition for one another's customers,[19] they would appear to constitute customer allocations in substance even if not in form. As Judge Learned Hand pointed out, a customer allocation arrangement need not "set up impenetrable boundaries between" customers; it is enough if it effectively insulates customers from competitive efforts. *See Pfotzer* v. *Aqua Systems, Inc.*, 162 F. 2d 779, 784 (2d Cir. 1947). *See also United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 575 (2d Cir. 1961). As this Court has held in connection with other forms of per se vio-

[19] By making its lines available generally for wheeling much of the power sold by the Bureau and Coops, Otter Tail has made it impossible, as a practical matter, that either will be able to build extensive transmission facilities to be used solely for those customers previously served by Otter Tail.

lations, it is the substantial effect of the arrangement that controls, not the form. *E.g., International Salt Co.* v. *United States,* 332 U.S. 392, 397 (1947) (tying arrangements); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 220, 222 (1940) (price fixing).

Initially, we respectfully suggest that there may be no need to reach the ancillary restraint issue. Even at common law, a covenant not to compete would not be deemed ancillary where the covenant is in favor of one possessing monopoly power. *See* Restatement, Contracts §516 (1932). That, of course, is the situation here.[20]

Furthermore, while Otter Tail characterizes the arrangements as equivalent to the leasing of certain of its facilities (Otter Tail Brief at 79, 80), this is not at all what it involved. Neither the Bureau nor the coops are leasing any of Otter Tail's equipment or facilities. On the contrary, they are contracting for the performance by Otter Tail of a service—*i.e.,* the transmission of energy to customers of the Bureau and coops—that Otter Tail is in the business of providing. Admittedly, Otter Tail also uses its transmission facilities for its own purposes, but this does not change the fact that it is also in the business of providing transmission service to others. The situation is analogous to a company that has its own delivery service and also delivers for others at a price.

Even if the situation were viewed as a covenant by a purchaser or a lessee not to use the property in competition with the seller or lessor, the "ancillary restraint" doctrine would not save it from condemnation under §1. The doctrine reflects an awareness that, under cer-

[20] Query whether the covenant could be deemed ancillary in any event since the District Court appears to have found that the anti-competitive motivation was dominant in the transaction.

tain circumstances, some restrictive arrangement is necessary in order to preserve for the parties the benefits or corpus of an otherwise legitimate transaction. The most obvious example is an agreement by a seller of a business not to compete with the buyer. In the absence of such a covenant, the seller could set up in competition with the buyer and thereby deprive the latter of the goodwill or going concern value for which he had paid. *See United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 281 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). *Cf.* Restatement, Contracts §516(a). Faced with this prospect, potential buyers would be either unwilling to purchase or willing to do so only at a substantial discount in price.

To apply this theory where the restriction is imposed upon the buyer or lessee, however, is to turn the world on its head. There is no need to protect the seller or lessor since he extracts fair value for the property in the price. Indeed, assuming that the seller or lessor is not in a monopoly position, imposition of a restrictive covenant upon the buyer or lessee could only work to reduce the price. This alone indicates that such a covenant in no way preserves the corpus of the original transaction; its only purpose is the anticompetitive one of insulating the market position of the seller or lessor.

Professor Bork has made much the same point:

> Though this paper is limited to consideration of ancillary restraints supporting sales of businesses and joint ventures, it may be well to note that some ancillary restraints known to the common law may find no proper place under the Sherman Act. The common law upheld the agreement of the

purchaser of property not to use the property in competition with the business of the seller. It may be doubted that such a covenant serves a purpose which should be respected by the Sherman Act. It does not enable the transfer of any intangible asset. The seller can extract the full value of the property sold in the price charged; there appears no reason to allow him to take part of the price in the form of an agreement to stay out of his market. The Supreme Court in a pre-Sherman Act decision upheld a covenant by the purchasers of a steamship not to use it in waters on which the seller continued to operate a transportation service [citing *Oregon Steam Navigation Co.* v. *Winsor*, 87 U.S. 64 (1873)]. This precedent has been followed recently by the Court of Appeals for the Fifth Circuit applying the Sherman Act to a similar covenant by the purchaser of a ship [citing the *Tri-Continental* decision]. The decision followed the common law without regard to the different values of the Sherman Act. The case illustrates the danger that insistance [sic] upon the literal rules of the common law will discredit the entire doctrine of ancillarity as a tool for Sherman Act analysis. That would be a disservice to the Sherman Act, lessening its capacity to distinguish between cases which differ in their impact upon competition. R. Bork, ANCILLARY RESTRAINTS AND THE SHERMAN ACT, 15 A.B.A. Section of Antitrust Law 211, 219 (1959).

This approach is supported by *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). The Court there held—over a dissent predicated upon the "ancillary restraint" doctrine (*see* 388 U.S. at 391-92)[21]—that vertical territorial and customer restrictions imposed by Schwinn upon resale of its bicycles by its

[21] The dissent cited, as does Otter Tail, *Oregon Steam Navigation Co.* v. *Winsor*, 87 U.S. 64(1873).

wholesalers and franchised retailers constituted per se violations of §1 of the Sherman Act:

> ... Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. . . . Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale. . . . *Id.* at 379.

Positing this result, a horizontal covenant not to compete between utilities would seem to present an *a fortiori* situation.

> There is a close parallel between the restraint in these cases [*i.e.*, where the buyer agrees not to compete] and a territorial restriction in a sale of goods by a manufacturer who does his own wholesaling or retailing in the reserved area. In that situation the manufacturer like the seller of the steamship, is protecting his retained business from the competition of the purchaser. This eliminates potential competition between supplier and distributor. But that is precisely what happens when part of a business is sold subject to a restrictive covenant given by the buyer. S. Robinson, PROVIDING FOR ORDERLY MARKETING OF GOODS, 15 ABA. Section of Antitrust Law 282, 292 (1959).[22]

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[22] ". . . The restraint is simply one more species of the traditional covenant not to compete by the purchaser of property. . . ." *Id.* at 298.

CONCLUSION

For the foregoing reasons, we respectfully submit that the District Court's decision should be affirmed on each of the points dealt with in this brief.

Respectfully submitted,

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September 30, 1972

Certificate of Service

I hereby certify that the foregoing brief has be
served in accordance with the requirements of Supre
Court Rule 33 by mailing copies thereof, first cl
and postage prepaid, to counsel for all parties o
record.

JOHN P. MCKENNA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-991

OTTER TAIL POWER COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From The United States District Court for The District of Minnesota

BRIEF OF MISSOURI BASIN MUNICIPAL POWER AGENCY AS AMICUS CURIAE

This brief, on behalf of the Missouri Basin Municipal Power Agency, as amicus curiae, is filed with the written consent of both the Appellant and the Appellee. (See Appendix A) The Missouri Basin Municipal Power Agency (the "Agency"), a nonprofit corporation of which the Village of Elbow Lake, Minnesota and 40 other municipally-owned electric systems are members, is dedicated to the continued strength and integrity of public power entities in the Missouri Basin. Its members, many of whom rely on Otter Tail Power Company ("Otter Tail") for electric services, are acutely concerned with the outcome of this case. If the

district court's decision is reversed or modified, the continued existence of these electric systems will be thrown into grave danger.

OPINION BELOW

The opinion of the United States District Court for the District of Minnesota, which is reported at 331 F. Supp. 54, is reproduced in the Appendix filed by Otter Tail in this case at A. 1–21.[1]

JURISDICTION

The judgment of the district court was entered on October 22, 1971, and was amended November 10, 1971. The appellant filed a timely notice of appeal and jurisdictional statement pursuant to Section 2 of the Expediting Act, 15 U.S.C. §29. This Court noted probable jurisdiction on May 22, 1972. 40 U.S.L.W. 3556

QUESTIONS PRESENTED

1. Does the scheme of regulating utilities in the United States preclude the application of antitrust law to otherwise illegal utility activity?

2. Should Otter Tail's adjudged anti-competitive activities be subject to the jurisdiction of a United States District Court?

STATUTES INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. §2, provides:

"Every person who shall monopolize, or attempt

[1]References to the Appendix of Otter Tail are cited throughout as "A___"

to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction, thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The pertinent parts of other statutes bearing upon the argument presented herein are set forth below in the appropriate parts of this brief.

STATEMENT OF THE CASE

On July 14, 1969 the United States filed a civil action against the Otter Tail Power Company, under the provisions of Section 4 of the Sherman Act, 15 U.S.C. §4. The complaint alleged that Otter Tail violated Section 2 of the Sherman Act, 15 U.S.C. §2, by both monopolizing and attempting to monopolize the trade and commerce in the sale of electric power in or to towns located in areas of Minnesota, North Dakota and South Dakota (A. 13).

The district court found Otter Tail guilty of the aforementioned violations and granted the injunction requested by the Government. Otter Tail appealed that decision to this Court pursuant to the Expediting Act, 15 U.S.C. §29.

The Otter Tail Power Company, headquartered in Fergus Falls, Minnesota, is an investor-owned utility primarily serving small towns in western Minnesota and eastern North and South Dakota. Otter Tail's operations consist almost exclusively of selling power

at retail to these municipalities under franchise agreements lasting from ten to twenty years.

From time to time a number of towns decided not to renew their franchises with Otter Tail and instead, to establish their own municipal electric facilities. The district court agreed with the Government's showings that Otter Tail had opposed these initiatives and had refused to cooperate with the municipalities by either selling power to them at wholesale or by "wheeling" power from another supplier (A. 28).

These practices by Otter Tail had the effect of strengthening its monopoly position in its service area, since few municipalities could afford to either rely totally on a municipal system for all of their power requirements, or transmit power from a distant supplier. Otter Tail denied that it had a monopoly, or was attempting to preserve one, and instead argued that its conduct was justified by an interest in preventing the erosion of its power supply system (A. 32).

Approximately 465 towns are served by Otter Tail. Within this service area there are 45 towns served by municipal electric systems, and 105 towns served by rural cooperatives. The district court determined that this service area was the relevant geographic market, and that, since Otter Tail serves 465 of the 615 towns in the area, it controls 75.6 percent of the market. In its decision the court noted that: "In our view this percentage is sufficient to justify the inference that Otter Tail possesses monopoly power in the area" (A. 34).

In granting the Government's requested relief the district court applied antitrust principles to the elec-

tric utility industry, and fashioned a remedy which, in effect, required Otter Tail to share its facilities with those of a competitor. The fact that the Federal Power Commission exists as an agency whose purpose is to regulate utilities, such as Otter Tail, did not operate as a bar to the court's granting of relief. The appropriateness of the remedy ordered by the court and the power of the court to hear such a case are now being challenged by the petitioners before this Court.

INTEREST OF THE AMICUS CURIAE AND INTRODUCTION TO THE ARGUMENT

The Missouri Basin Municipal Power Agency, of which the Village of Elbow Lake is a member, is a nonprofit corporation authorized by the Iowa Intergovernmental Agreement Act of 1965, I.C.A. §§28E. 1–28E. 14. It is comprised of 41 municipal electric systems in the states of Iowa and Minnesota with a total peak demand for power of approximately 145,000 kilowatts in 1971. During the year 1971, customers of municipalities which are members of the Agency consumed approximately 640 million kilowatt hours of electric energy.

Members of the Agency are vitally interested in the outcome of this case because it is their future power supply which is at stake. Nine Agency members are located in the service area of Otter Tail Power Company (Otter Tail) and depend on Otter Tail for electric service in one form or another. Should this Court reverse the lower court and condone the activities engaged in by Otter Tail through which it attempted to enhance its monopoly position in the business of supplying retail electric power and energy in its service area, Agency members will face the specter of compet-

ing with a company totally exempt from the most basic constraints of antitrust law and public policy. Thus unleashed, Otter Tail would be free to wield its monopoly power against other Minnesota towns at the only point it faces real competition—the point at which a municipality considers the question of providing its own electric service. Beyond stifling new competition, Otter Tail would be free to employ its monopoly position to mount a campaign against the continued existence of other public power systems, including Agency members which would, as shown below, eventually lead to their demise.

ARGUMENT

I

Otter Tail's Anti-Competitive Practices Are Apparent From an Examination of Otter Tail's Position in Its Service Area

Before returning to the legal arguments raised by Otter Tail in support of its appeal from the decision rendered against it by the district court, one should have a clear understanding of the electric power industry in the Otter Tail service area. Flung over approximately 68,000 square miles of flat, sparsely populated, upper midwestern plains, the Otter Tail service area is comprised primarily of small urban communities and farm lands. While this service area is literally laced with power lines totaling thousands of circuit miles, the district court properly distinguished among the differing kinds of lines found and the purposes they serve.

Substantial portions of the high voltage transmission lines (115 kv and above) are primarily owned and operated in the Otter Tail service area by the United States Bureau of Reclamation. These lines move large

quantities of power in bulk form to points of interconnection with Otter Tail which, in turn, delivers the power to "preference" customers over its transmission (115 kv) and subtransmission (22 kv to 69 kv) lines. Additional high voltage lines in the Otter Tail service area are owned by other investor-owned utilities and are utilized for transmission of power through the area or, in some instances, to interconnect these utilities with the Otter Tail system.

Distribution lines (12.5 kv and less), at the end of the spectrum, serve only a retail purpose. Hung from poles in alleys and parkways, these low voltage facilities carry power from the load center substations to the ultimate consumer. The link between the high voltage transmission system and the house-to-house distribution system is what was termed by the district court as the "subtransmission system." It was at this level that Otter Tail was found to dominate the market. Otter Tail, through its vast network of subtransmission lines reaching into 75.6 percent of the towns in its service area, was found to possess "strategic dominance in the transmission of power in most of its service area" (A. 36). It was Otter Tail's exclusive ownership of the facilities required to "wheel" or deliver power from the interconnected area transmission grid to retail distribution systems in its service area which caused the district court to fear for the future of competition. Otter Tail alone possessed the power to grant or deny to literally hundreds of potential competitors access to the bulk power supply resources of the Missouri Basin.

Otter Tail's dominance in the field of subtransmission facilities is not unique in the structure of the elec-

tric power industry nor does it derive any special set of circumstances applicable only to Otter Tail. In the early days of the industry, prior to the development of large scale generating plants and high voltage transmission facilities, electric power was generated in small plants immediately adjacent to load centers in order to minimize transmission losses.[2] In many cases, power "systems" served only a few square blocks of a metropolitan area. With the discovery of efficient, high voltage transmission techniques and the construction of huge generators, power production could, and in fact did, move farther and farther away from the immediate vicinity of the load centers.

As technology advanced, many small public and private power systems were merged or sold to companies which continued to grow. These larger companies could afford to take advantage of the economies of scale associated with power production and transmission and as a result continued to enhance their position in what is called the "bulk" power supply market. Most municipally-owned power systems which survived this trend could not justify the construction of huge, bulk power supply facilities themselves. They either continued to produce their own power in relatively inefficient, iso-

[2] Power losses over a given transmission distance are a function of the voltage level at which power is transmitted. The loss in power is inversely proportional to the square of the voltage. Thus, a given amount of power transmitted one mile at 1,000 volts with a 5% loss can be transmitted 100 miles at 100,000 volts with no greater losses. Among the earliest central power stations to operate commercially in the United States was the Pearl Street Station of Thomas Edison. This station was limited to serving lighting customers within a few square blocks because of the low level of distribution voltage. Today, power from a generating station can be transmitted over tens of thousands of square miles at voltage levels ranging from 115,000 volts to 750,000 volts.

lated plants or, in the alternative, turned to purchasing some or all of their requirements at wholesale from the large investor-owned companies.

It is some of these few remaining towns which constitute the nucleus of competition today in the Otter Tail service area. They compete in an effort to retain the responsibility of serving their retail customers as opposed to turning the job of serving those customers at retail over to Otter Tail Power Company. The *only* competition Otter Tail faces today arises from the possibility that some one of the towns it presently serves at retail might decide to switch to another retailer—namely the town itself.

This competition is sporadic—occurring only when a franchise is due to be renewed or when the town fathers review the operations of their own municipal system to determine whether or not to continue to meet the town's electric needs. Nevertheless, the competition is real. It occurs at essentially the only place it can in the Otter Tail service area because neither duplicate retail distribution facilities nor duplicate high voltage facilities would in most cases be economically feasible. Competition for the right to serve the retail customer in the Otter Tail service area serves no different purpose than it serves elsewhere—it is a device to insure that to the maximum extent possible scarce resources are put to their most efficient use. Further, it prohibits any one entity from exercising monopoly power over a market area. Competition for the retail franchise in the Otter Tail service area is a type of competition which will thrive and bestow many benefits—as long as it is permitted to exist.

II

The Proper Functioning of the Electric Utility Regulatory Scheme Depends Upon Application of the Antitrust Laws to Electric Suppliers

Section 10(h) of the Federal Power Act provides for application of antitrust principles to the electric power industry:

> "Combinations, agreements, arrangements, or understandings, expressed or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited." 16 U.S.C. §803(h)

Even in the absence of the Federal Power Act, antitrust considerations are an important part of the regulatory scheme. In his opinion in *City of Pittsburgh* v. *FPC*, 237 F. 2d 741, 754 (D.C. Cir. 1956), Judge Bazelon stated:

> "The Commission, while it 'has no power to enforce the Sherman Act (15 U.S.C.A. §§1–7, 15 note) as such . . . (and) cannot decide definitely whether the transaction contemplated constitutes . . . an attempt to monopolize which is forbidden by the Act . . .' nevertheless, 'cannot without more ignore the [Act].' [footnote omitted] Thus, if it appears that Texas Eastern's project would tend to produce monopolization of a petroleum products market, the Commission cannot ignore that fact merely because it is an antitrust factor and such factors have been placed within the ken of the Attorney General." [quoting from *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79–80 (1944)]

The regulatory scheme in the United States, rather than rejecting the application of antitrust principles to the utility industry, in fact requires the application of

those principles to insure an optimum allocation of resources by private industry. Any assertion that the electric utility industry is somehow exempt from the antitrust laws flies in the face of decisions by this Court and other courts. *California* v. *FPC,* 369 U.S. 482 (1962); *Pennsylvania Water and Power Co.* v. *FPC,* 343 U.S. 414 (1952); *Consolidated Gas Electric Light and Power Co.* v. *Pennsylvania Water and Power Co.,* 184 F.2d 552, 558 (4th Cir. 1950), *cert. denied,* 340 U.S. 906 (1950); *United States* v. *American Natural Gas Co.,* 206 F.Supp. 908 (N.D. Ill. 1962).

As we show below, the regulatory process for electric utilities not only requires that antitrust principles be applied to the industry, but Congress has also enacted statutes which specifically subject the industry to antitrust principles. The industry, of course, has not always agreed and on several occasions has attempted to secure congressional exemption from the antitrust laws. *e.g.,* S. 683, 90th Cong., 1st Sess. (1967); S. 3136, 89th Cong. 2d Sess. (1966); *Hearings on S. 3136 Before the Senate Committee on Commerce,* 89th Cong., 2d Sess., ser. 89–71 (1966).

A. State and Local Laws Promoting Competition Will Be Frustrated If Otter Tail's Anti-Competitive Conduct Is Left Unchecked

Minnesota law confers on municipalities the authority to operate their own electric systems. Section 452.02 of Minnesota Statutes, 1971, which is similar to statutes in North Dakota[3] and South Dakota[4] provides that:

> "Every city of this state shall have the power to own, construct, acquire, purchase, maintain, and

[3] N.D. Century Code § 40-33-01
[4] S.D.C. 1960 Supp. § 45.0201 (77)

operate any public utility within its corporate limits . . ."

After the governing body of a town has decided that the town should satisfy its own power requirements, a special election must be held for the purpose of allowing the citizens of the community to express their opinion on such an important venture. The approval of three-fifths of the voters is necessary before any municipal power plan can be adopted.

Once a municipal power system has been established, the local city council (or power commission in towns of less than 10,000 people) is invested with authority to fix rates and generally operate the system. Minnesota law also requires that the council publish an annual financial report to keep citizens informed about their municipal power supply system. Minn. Stat. 1971, §§452.04, 953.01.

Having determined to meet its own power supply needs, a town must then decide how to obtain electric energy. It may chose to install its own generators to supply either all or a portion of its requirements leaving the balance to be supplied through purchases from other suppliers. Alternatively, it may decide to purchase all its own requirements at wholesale and only distribute electricity to its customers.

In the Otter Tail service area in Minnesota 26 towns have chosen to meet their own needs (A. 1203–1204). Of these, 9 are members of the Missouri Basin Municipal Power Agency.

Missouri Basin Municipal Power Agency Member Electric Systems Located in the Otter Tail Service Area

Town	Population (1960 Figures)	Energy Consumed 1971 (1,000 Kwh)	Peak Demand 1971 (Kw)	Nameplate Capacity of Local Installed Generation (Kw)
Alexandria, Minn.	6,713	59,900	11,400	14,500
Barnesville, Minn.	1,632	7,006	1,600	1,470
Benson, Minn.	3,678	19,900	4,170	3,635
Detroit Lakes, Minn.	5,633	46,517	9,370	14,375
Elbow Lake, Minn.	1,521	6,340	1,370	2,272
Henning, Minn.	980	3,878	775	–0–
Lake Park, Minn.	not available	2,400	560	–0–
Madison, Minn.	2,380	1,320	2,930	3,151
Ortonville, Minn.	2,674	16,600	3,850	–0–

As can readily be seen, some towns currently own generators with which they can meet a portion of their own requirements. Only Alexandria, Detroit Lakes, and Elbow Lake have sufficient reserves to safely operate in isolation from any other source of power at the present time. In fact, none of the towns do. The towns with generating capacity of their own, with the exception of Elbow Lake, keep their generators in standby status and are available to provide emergency service to Otter Tail in periods of trouble and exceptionally high demand on the Otter Tail system. Only Elbow Lake must generate its own requirements and is prevented from purchasing from other sources, including the foregoing towns with existing excess capacity because of Otter Tail's refusal to wheel. All but Elbow Lake have contracts with Otter Tail for wheeling Bureau of Reclamation power to them which they use to meet current loads.

A town may meet its power supply needs in another way. It may grant a franchise to an investor-owned utility to supply its needs for electric energy at retail to the town.[5] Four hundred sixty-five towns have entered into this kind of arrangement with Otter Tail (A. 29). It was the latter plan which Elbow Lake selected in 1913 when it made the decision to purchase power from Otter Tail. An appreciation of the continuous stream of obstacles Otter Tail threw in the path of its competitor, Elbow Lake, requires some recitation of the factual record.

In 1949 the voters of Elbow Lake decided to exercise their power to establish their own municipal power system. Less than one year after the 452-130 vote approving such a plan, Otter Tail, along with three Elbow Lake residents, sued Elbow Lake to enjoin the sale of revenue certificates and the construction of the municipal system (A. 50). A state trial court ruled in favor of Elbow Lake, but Otter Tail appealed. The lower court ruling in favor of Otter Tail was subsequently affirmed by the Supreme Court of Minnesota (A. 51). However, as a result of the years of litigation and delaying tactics on the part of Otter Tail, the Village of Elbow Lake incurred sizable expenses. In spite of its decision to the contrary, the only realistic course of action for Elbow Lake after litigation ended was to settle with Otter Tail (A. 52).

Otter Tail's abuse of the electoral and judicial processes in 1949 and 1950 was only a preview of its future dealings with Elbow Lake in the 1960's. Another attempt to establish a municipal system was begun in

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[5] Minn. Statutes §455.13 (maximum length of franchise is 15 years); N.D. Century Code §40-05-01; S.D.C. §52.1509(2).

the early 1960's. In June 1960 the contract and franchise of Otter Tail with Elbow Lake expired. A new contract was proposed by Otter Tail and called for rate increases. This contract, however, was rejected by the village council, and the decision to establish a municipal system was made shortly thereafter. Numerous efforts to achieve a compromise settlement with Otter Tail were rebuffed, and on December 5, 1961 the voters of Elbow Lake overwhelmingly approved the village council's plan. The following January, the voters again demonstrated their support for the municipal system in their approval of the bond issue by a vote of 538-160 (A. 53).

During the spring and summer of 1962 the village council continued its task of drawing up plans and specifications for the new system. Invitations for bids were sent out, and the date of October 30, 1962 was set for the receipt of bids. On the morning of that day Otter Tail commenced a lawsuit against Elbow Lake in an endeavor to halt construction of a municipal system. All of the village officials were served, with the exception of the Mayor, A. H. Kanstrup, who had been one of the few townspeople to oppose the project. As a consequence of this action no bids were received and no bond issue was possible later, for Elbow Lake could not certify to bond counsel that it was free of pending or prospective litigation concerning all aspects of the proposed electric system.

On August 8, 1963 the state trial court dismissed Otter Tail's complaint, holding that: (1) the contracts negotiated by Elbow Lake were in all respects proper and legal; (2) Elbow Lake exercised proper business judgment in accepting and awarding bids; and (3) plans and specifications were sufficiently precise to

afford a proper basis for competitive bidding and were in all respects reasonable and proper (A. 54). Nevertheless, Otter Tail appealed. On February 5, 1965 the Minnesota Supreme Court unanimously affirmed the lower court's dismissal (A. 56).

In the years since 1962 Otter Tail endeavored to maintain its franchise in Elbow Lake by offering to pay the expenses which the village incurred in building its municipal system and defending its interests in court. Such costs would be assumed by Otter Tail in return for a new franchise. But Otter Tail has consistently refused to negotiate the rate which Elbow Lake would be required to pay under the new franchise (A. 55-59).

At a village council meeting on April 6, 1965 Otter Tail representatives stated that they intended to use any legal means available to protect its investment in the village (A. 57). In pursuing its various lawsuits against Elbow Lake and the other communities who were interested in "going municipal," Otter Tail absorbed virtually all of the costs associated with the litigation, including legal fees for others to fight on its behalf. In each instance the resort to litigation brought the effort to establish a municipal electric system to a halt.

The district court reviewed this activity and concluded that it was instituted by Otter Tail for the purpose of frustrating competition and preserving its monopoly position (A. 41). But appellants would now have this Court shroud their activity with the veil of "public utility regulation" and somehow exempt their transgressions from the application of the most elementary antitrust statutes because to do otherwise

would upset the regulatory framework. The fact of the matter is there is hardly any regulatory framework to frustrate. Up until 1966 when an interconnection proceeding was finally instituted, little attention was focused on Otter Tail by the Federal Power Commission. More importantly, Otter Tail was subject to no public utility commission jurisdiction in South Dakota or Minnesota, for those states do not provide for any state regulation of electric utility activity. In those states, the only regulators are the municipalities to whom Otter Tail sells at retail. Given the force with which Otter Tail's monopoly power was unleashed against Elbow Lake once it started to consider "going public" there is a serious question whether other towns can effectively exercise any regulatory jurisdiction over Otter Tail at all.

When viewed in the perspective of the foregoing undisputed facts, it is undeniable that the basic elements of competition do indeed exist in the electric industry in Otter Tail's service area in Minnesota. Competition is waged for the privilege of serving electric energy needs at retail even if only on a periodic basis. Furthermore, the survival of this competition depends upon the application of the nation's antitrust laws, and without their vigorous enforcement here, the harassing activities of an unchecked monopolist will continue to be brought to bear in even more baneful ways on other municipalities which attempt to compete with Otter Tail. The state and local regulatory scheme, circumscribed as it is in the Otter Tail service area, requires the continuing availability of the antitrust laws to insure against stifling even the limited competitive activity which does now exist.

B. Federal Regulatory Policy and Law Favor the Application of Antitrust Concepts to the Electric Utility Industry

1. *The Federal Power Act*

One of Otter Tail's basic contentions is that the federal regulatory framework somehow prevents the United States courts from invoking the provisions of the Sherman Act against public utilities. Appellant bases this sweeping assertion upon an imprecise interpretation of the limited powers given to the Federal Power Commission under the Federal Power Act.

Section 202(a) of Part II of the Federal Power Act, 16 U.S.C. §824(a), gives the Federal Power Commission authority to promote voluntary interconnections among utilities and, when in the public interest, authorizes the Commission to order interconnections provided such an order does not result in forced enlargement of generating facilities or impairment of a party's ability to render adequate service to its customers. Otter Tail suggests that this grant of authority to an administrative body with only limited jurisdiction over public utilities[6] constitutes a bar to the similar exercise of such activity by any court. Amicus curiae does not intend to belabor its answer to this point except to say that Otter Tail and the Commission as well misconceive the statute and its relation to this case.[7]

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[6] The Commission has no authority over retail rates or service rendered by utilities, liability of utilities for the services they furnish, or service areas of utilities in interstate commerce and has no authority over utilities which engage only in intrastate commerce. The Commission also *claims* it lacks jurisdiction over allegations of anti-competitive conduct in connection with its jurisdiction over issuance of debt securities. Brief of Federal Power Commission at 10, *Gulf States Utilities Co.* v. *FPC, cert. granted,* 40 U.S.L.W. 3568 (U.S. May 30, 1972) (No. 71-1178).

[7] See Brief of Federal Power Commission as Amicus Curiae in Support of Appellant at 7-10.

First, there is no comprehensive public utility regulatory scheme on a federal level which could conceivably be construed as having removed antitrust jurisdiction over public utilities from the courts. The Commission is without jurisdiction to decide antitrust issues as such. *Calfornia* v. *FPC,* 369 U.S. 482 (1962), Brief of Federal Power Commission at 19, *Gulf States Utilities Co.* v. *FPC, cert. granted,* 40 U.S.L.W. 3568 (U.S. May 30, 1972) (No. 71-1178). The Commission itself concedes that it can proceed to remedy proven anticompetitive conduct only if such conduct were not outweighed by other factors which determine the public interest. Any remedy the Commission might invoke is subject to the severe limitations of Section 202(b) of the Federal Power Act relating to enlargement of generating facilities. In light of the well-established principle that the courts possess broad, flexible, equitable powers to correct antitrust violations, the Federal Power Commission's jurisdiction can in no sense of the word be held to be "complete" or a satisfactory substitute for federal court jurisdiction. *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131 (1948); *United States* v. *Griffith,* 334 U.S. 100 (1948).

Second, Otter Tail suggests that while "repeals by implication are not favored," *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, 437 (1907), the antitrust principles employed here fall in the category of cases where they are so repugnant to the regulatory scheme that they must be rejected. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 351 (1963). The facts demonstrate that the contrary is true. While the district court's decision may be repugnant to Otter Tail, it cannot be construed as repugnant to the regu-

latory process. No federal regulatory agency even had jurisdiction in the matter while the anti-competitive acts under review were occurring, since only the renewal of a retail franchise was involved. The so-called repugnancy occurred long before the Federal Power Commission obtained jurisdiction, and it is those acts which constitute substantial evidence of anti-competitive activity here. To deny Elbow Lake and others similarly situated redress for those wrongs would be to commit them to a lawless twilight zone of otherwise illegal competition.

Third, to accede to Otter Tail's position, embraced by the Federal Power Commission's brief, that the Federal Power Commission is the forum of the first instance and that the courts of the United States are no longer competent to measure allegations of anti-competitive activity when electric utilities are involved, is to subvert the power of states to regulate utilities and authorize their local subdivisions to enter the utility business. Apparently the Federal Power Commission would be the arbiter of all attempts by municipalities to enter the retail market and compete with existing power suppliers. Should a town heretofore receiving electric service at retail wish to assume the responsibilities of meeting its own power needs it must not only be prepared to suffer the irritating and needless practices foisted upon the citizens of Elbow Lake without hope of judicial relief but it must also submit its complaint to the Federal Power Commission which apparently would be the judge of whether or not Otter Tail must refrain from anti-competitive conduct and abandon its stranglehold on the "bottleneck" designed to bar the entry of any potential competitors.

There remains one final point as to whether or not Section 202(b) of the Federal Power Act exempts utilities from the purview of the courts of the United States where possible violations of the antitrust statutes may be involved. The Federal Power Act confers regulatory authority of a limited nature on the Commission as an administrative agency. It does not constitute a grant of plenary power over the electric utility industry. Its legislative history indicates how much power the Congress *gave to* the agency—not how much it *reserved from* the courts. It is an exercise in futility to rummage around in the legislative history of the Federal Power Act to determine whether or not the Act exempted utilities from operation of the antitrust laws. Neither the Federal Power Act nor any other federal act purports to establish a comprehensive regulatory framework within which all electric utility activity should be governed, and absent any explicit statutory provision, it is incorrect to assume that the Act amounts to any more than is contained on its face.

The fact that Congress failed to give the Federal Power Commission the authority to enforce the Sherman Act is apparent from an examination of the Federal Power Act and other acts governing regulatory agencies.

Several of these agencies are empowered to enforce the Clayton Act,[8] and Section 21 specifically authorizes the following agencies to enforce Sections 2 3, 7 and 8 of the Act: the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Reserve Board, and the Federal Trade Commission. The Federal Power Commission has not been given any such power

[8] 15 U.S.C. §12 *et seq.*

In addition to the Clayton Act, numerous other acts have given antitrust jurisdiction to federal agencies. The power to enforce the antitrust laws against certain regulated industries or exempt them from regulation is contained in acts dealing with the following agencies: the Interstate Commerce Commission (49 U.S.C. §5(b)); the Federal Communications Commission (47 U.S.C. §222); the Federal Reserve Board (12 U.S.C. §1842).

Nowhere in the Federal Power Act can one find such a specific grant of authority to the Federal Power Commission. Nor can one find provisions analogous to those in the Civil Aeronautics Act, 49 U.S.C. §488(e), or the act governing the Federal Maritime Commission, 46 U.S.C. §814, which specifically defines what powers the respective commissions have over the industries which they regulate. Absent a finding of such provisions it is incorrect to assert that any antitrust claim which an aggrieved party has can be pursued through the Federal Power Commission.

2. *The Atomic Energy Act*

The Atomic Energy Act clarifies whatever doubt might remain as to whether or not Congress intended that the electric utility industry should be subject to the constraints of the antitrust acts. Section 7 of the Atomic Energy Act of 1946, 60 Stat. 764, included a specific congressional mandate which prohibited the use of atomic resources "to maintain or foster the growth of monopoly, restraint of trade, unlawful competition, or other trade positions inimical to the entry of new, freely competitive enterprises" in the field of nuclear power generation. It is quite clear that it was the intent of Congress, in enacting the legislation, that

the utility industry was to be subject to antitrust constraints. The Atomic Energy Act of 1954, 42 U.S.C. §2011 *et seq.*, replaced the earlier Act and included the same prohibitions. Until 1970, however, nuclear power plants were not licensed under commercial license provisions under the Act, but rather were licensed as research and development facilities pursuant to 42 U.S.C. §2134, which effectively exempted any proposed license from antitrust scrutiny.

Congress, however, passed an amendment to the Atomic Energy Act in 1970, 42 U.S.C §2135, which subjected all nuclear power plant license applications to antitrust review. This affirmation of congressional policy removed all doubt as to whether the electric utility industry may be permitted to operate outside the antitrust laws. Even in the area of atomic reactor licensing, Congress clearly indicated that antitrust principles should be applied to the electric power industry.

In reviewing the arguments of all of the parties to this case, the Court should keep one fact in mind: the effect of Otter Tail's activities, however they may be described, has been to hinder the growth of municipally-owned electric systems in the region presently dominated by Otter Tail. If the Court determines that these practices are not in the public interest it must go on to consider what remedies are to be afforded the injured parties.

Amicus curiae have already shown that relegating the municipalities to state regulatory proceedings would be futile, since no regulatory jurisdiction exists. Nor would a remand to the Federal Power Commission be a responsible alternative since the Commis-

sion's authority to remedy anti-competitive conduct is limited to only the few circumstances mentioned above, none of which are present here. The actual competition occurs on the day the franchise is granted or withdrawn—at a time when the Commission has no power to act.

If Otter Tail is deemed a monopolist, it becomes subject to the full sanction of the Sherman Act, and relief in the federal courts is altogether proper.

III

Competition in the Electric Power Industry Will Be Irreparably Damaged If Otter Tail Activities Are Sanctioned

A. Competitive Setting in the Otter Tail Service Area

The district court found that Otter Tail is generally the sole supplier of electricity at retail for the municipalities it serves; thus, it controls virtually 100 percent of each such market (A. 87). The competition for sale of electric power in these towns is generally between Otter Tail and the proposed or existing municipal utility system (A. 89). Of the approximately 465 communities with which Otter Tail had contracts for the sale of electricity at retail, only twenty-eight had populations of 1,500 or more and only two had populations in excess of 10,000 (A. 17).

The Village of Elbow Lake decided in 1960 that it would supply its own municipal power requirements. In order to accomplish that objective Elbow Lake reviewed several alternative possibilities.

First, it could install its own generators and rely on these to supply its power and energy requirements. However, as the most recent publication of the Federal

Power Commission[9] found, this is an unsatisfactory alternative in view of existing technology, today's trend toward the interconnection of facilities, and the structure of the power industry:

> "Mounting reliability problems, high cost of money, growing problems of finding and retaining good operating personnel, and increasing costs of plant operations are all factors which favor interconnected operation." Part I, ch. 17, p. 29.

> "Isolated systems traditionally experience relatively high supply costs and inferior bulk power reliability . . . On such systems the forced outage of a generating unit may represent loss of such a large portion of on-line capacity that partial or total power failure may result before other units can respond to meet the increased load placed upon them. Also, an isolated system is vulnerable to extended service interruptions if fire, natural disaster, or other catastrophe destroys one or more of its major generating plants." Part I, ch. 17, p. 28.

These findings by the Federal Power Commission were not new. *The National Power Survey* for 1964 expressed a similar concern for the problems which isolated systems encounter, and the limited alternatives which they have in terms of competing with larger, investor-owned systems.[10]

> "[T]he small electric systems are at an economic disadvantage in the production of power. Other things being equal, small plants cost more per kilowatt to build, burn more fuel per kilowatt hour, cost more per kilowatt hour to operate, and require much larger percentages of reserve capacity for emergencies when operated in isolation . . .

[9] FPC, *The 1970 National Power Survey* (GPO, Dec. 1971).
[10] FPC, *The 1964 National Power Survey* (GPO, Oct. 1964).

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"Many small systems have been restricted to a choice between generating their own power and buying it at wholesale from one of the large integrated investor-owned systems . . . The absence of consistently effective regulatory surveillance of wholesale power contracts has contributed in the past to these limited choices by small electric systems." Part I, pp. 272–3.

Otter Tail, of course, forced Elbow Lake to adopt this uneconomic alternative. The futility of attempting to maintain an isolated system was recognized by the Federal Power Commission in its recent decisions relating to Elbow Lake, ordering first a short-term and then a long-term interconnection between Elbow Lake and Otter Tail. *Village of Elbow Lake* v. *Otter Tail Power Co.*, FPC Docket No. E-7278, 40 FPC 1262 (1968), *aff'd sub nom., Otter Tail Power Co.* v. *Federal Power Commission*, 429 F. 2d 233 (8th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971) (short term interconnection); *Village of Elbow Lake* v. *Otter Tail Power Co.*, (printed in Appendix at A. 187–203) FPC Docket No. E-7278, *appeal docketed*, No. 72-1088, 8th Cir., February 18, 1972, *sub nom., Otter Tail Power Co.* v. *Federal Power Commission* (long term interconnection).

Second, Elbow Lake could purchase bulk power and energy from Otter Tail at wholesale. This arrangement, which is common throughout the United States, was rejected by Otter Tail (A. 56, 59).

Third, Elbow Lake could purchase power and energy from other bulk suppliers. It is entitled to a quota of federally-generated power, marketed by the Bureau of

Reclamation on a preference basis.[11] It could also seek power and energy from other suppliers such as United Power Association, Basin Electric Power Cooperative, or Cooperative Power Association. Each of these sources generates power at plants some distance from Elbow Lake but none has subtransmission facilities sufficiently close to Elbow Lake to deliver the power (A. 37, 59-61). Since it was economically infeasible for Elbow Lake to build its own subtransmission facilities and therefore to duplicate Otter Tail's (A. 99-101), it was forced to seek "wheeling" service over Otter Tail's system. Each request for this service, however, was met with a flat refusal (A. 57, 58, 59, 60).

With respect to Elbow Lake's request for wheeling of Bureau of Reclamation power, Otter Tail asserted that Section 27 of its contract with the Bureau prohibited the use of Otter Tail's transmission facilities to wheel power to a town which had been served at retail by Otter Tail (A. 57). It also pointed to provisions existing in its agreements with several rural electric cooperatives, which prohibit the use of the Otter Tail transmission system by the cooperatives to supply power to a customer served by Otter Tail, and which extend the same prohibitions to customers served by the cooperatives (A. 129). However, Otter Tail presently wheels power to approximately seventeen municipal systems, many of which are towns previously served by Otter Tail at wholesale or retail (A. 105).

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[11] The Bureau obtains power from the Fort Peck Project located on the Missouri River at Fort Peck, Montana (see Fort Peck Act, 16 U.S.C. §833 *et seq.*) Pursuant to the terms of §833(c) the Bureau "shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives." See also Appendix pp. 112-118.

There can be only one possible explanation for Otter Tail's refusals to wheel: Otter Tail used its dominance in transmission to prevent municipalities from establishing their own system.

The district court made a number of findings which should be emphasized at this point:

1. From an engineering standpoint there is no reason why Otter Tail could not wheel power from another supplier to a town which it presently serves at retail (A. 105).

2. From an engineering standpoint there is no reason why Otter Tail could not sell power at wholesale to a town which it presently serves at retail (A. 109).

3. No other investor-owned electric utility in Minnesota or North Dakota and South Dakota has a policy similar to Otter Tail's regarding wholesale rates (A. 111).

A fourth alternative open to Elbow Lake consisted of a combination of two of the foregoing alternatives which is also common in the utility industry today. Self-generation could be combined with an interconnection to the Otter Tail system for emergency back-up purposes. This arrangement was eventually secured but only through extensive, burdensome litigation by Elbow Lake which Otter Tail is still appealing. *Otter Tail Power Co.* v. *Federal Power Commission, supra.* Elbow Lake could also purchase non-firm or interruptable power and energy from other suppliers and purchase only supplemental requirements from Otter Tail. Otter Tail refused to be a party to any of these possible arrangements. Moreover, Otter Tail, as

the sole owner of subtransmission facilities near Elbow Lake, controlled Elbow Lake's ability to enter into any of these arrangements alone.

Elbow Lake is not the only town which faces the dilemma posed by Otter Tail's monopoly control over all power supply alternatives. Each town in the Otter Tail system is in a similar position. Whether a town purchases power and energy at wholesale from Otter Tail or currently receives wheeling service from Otter Tail, as do the towns shown on page 27 *supra*, each must provide for its electric requirements in the future. Retail franchises expire at periodic intervals and towns purchasing at retail from Otter Tail must decide whether or not to renew Otter Tail's franchise. Towns which distribute their own power must be prepared to meet growing power supply requirements in the future. They have been informed that the Bureau of Reclamation cannot continue to supply additional power needs (*e.g.* A. 117) and must, therefore, meet future growth requirements by another means.

Yet each town in the Otter Tail service area is faced with Otter Tail's intransigent attitude of refusing to deal with it. Such a refusal to deal, coupled with Otter Tail's monopoly position as the sole owner of facilities for delivering bulk power in the area, means that each town is precluded from competing with Otter Tail.

B. Otter Tail's Anti-Competitive Activities, If Sanctioned by This Court, Will Destroy All Possible Competition

The dispute involved in this case follows to a substantial degree a nationwide pattern of disputes between investor-owned and consumer-owned electric utilities as evidenced in such cases as *Gainesville Utilities Department* v. *Florida Power Corp.*, 402 U.S. 515

(1971); *City of Lafayette* v. *SEC*, 454 F. 2d 941 (D.C. Cir. 1971), *cert. granted*, 40 U.S.L.W. 3568 (U.S. May 30, 1972); *Cities of Statesville* v. *Atomic Energy Commission*, 441 F. 2d 962 (D.C. Cir. 1969); and *Municipal Electric Association of Massachusetts* v. *Securities and Exchange Commission*, 413 F. 2d 1052 (D.C. Cir. 1969). Essentially, publicly-owned and cooperative power systems have been, and are being, subjected to practices by investor-owned utilities which deny them access to low-cost bulk power supply, transmission services and supplemental, stand-by power or emergency back-up essential to the operation of any electric system generating its own requirements.

The end results of these practices are: (1) to force every consumer-owned system now buying privately-produced power at wholesale to remain as the captive customer of its existing supplier; (2) to deny municipalities now served at retail by an investor-owned company the option of terminating the company's franchise and installing a municipal system; (3) to deter consumer-owned systems from undertaking joint ventures in large-scale (and therefore low-cost) generation; and (4) eventually to create or preserve a climate that will facilitate takeover or absorption of the consumer-owned systems by the investor-owned utilities.

In this case many of these elements are present. Amicus curiae do not suggest that healthy competition between investor-owned and consumer-owned utilities should not exist. Rather amicus curiae support the proposition, for it is only through competition that the free enterprise system can insure that its scarce resources are allocated on an efficient basis. The problem here is to insure that no one competitor gains unfair advantage over another competitor.

Otter Tail's refusal to deal with Elbow Lake, in effect, was aimed at negating the possibility of any retail competition in Elbow Lake. Rural cooperatives do not generally compete for the retail distribution of power in towns served by Otter Tail (A. 88). The Bureau of Reclamation only sells power to municipalities at wholesale, and does not sell power at retail to any town in the Otter Tail service area (A. 90).

In the case of Elbow Lake, the point at which competition occurred is the point at which the town chose to provide for its own retail electric requirements. Spirited competition occurred as it should have. Thereafter, however, Otter Tail exerted its monopoly power to squeeze out its newly established competition. If Otter Tail's activities are sanctioned by this Court, every other municipality in Otter Tail's service area will face the specter of years of costly and frustrating litigation and otherwise illegal activities designed to thwart any attempt by it to exercise its right to compete with Otter Tail in the retail electric energy market. In view of the resources available to many of these municipalities, such a burden will most certainly be too heavy for them to assume. The result will be that Otter Tail, by threatening to wage another Elbow Lake "battle," will effectively prevent new competition. Moreover, municipalities which currently purchase their present electric requirements from non-Otter Tail sources, if denied additional wheeling and other services from Otter Tail to meet future load growth, will be forced to generate power in isolation to meet the demands of their systems or succumb to Otter Tail and grant it a retail franchise. In either case the competitive model of economic organization will

be derailed and an existing monopolist will further increase its share of the market.

C. The Remedy Adopted by the District Court Is the Only Feasible Means of Restoring Competition in this Case

The district court's remedy in this case, essentially an injunction prohibiting further refusals to deal on Otter Tail's part, was the only feasible means of correcting the state of affairs created by Otter Tail's continued abuse of its monopoly power. The remedy ordered by the district court would simply require Otter Tail to allow other suppliers to wheel power over its transmission lines to Elbow Lake, or, in the alternative, require Otter Tail to sell power at wholesale to the town. Otter Tail presently wheels power to approximately seventeen communities which it had previously served at retail. Thus, the district court's remedy in this case would not in any sense force Otter Tail into a radical departure from its present operations.

Otter Tail cannot be heard now to complain of the decision, for firms found guilty of similar violations of the antitrust laws have experienced even more disruptive remedies such as divestiture, dissolution and divorcement. See *United States* v. *Paramount Pictures Inc.*, 334 U.S. 131 (1948); *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911).

Ordering Otter Tail to deal with Elbow Lake is a reasonable method of forcing Otter Tail to cease abusing its monopoly status. While it is true that the order would create a new competitor for Otter Tail in the retail distribution of power, such a situation, particularly with reference to a company claiming a "natural monopoly" position is by no means unprece-

dented. The Court in *United States* v. *Terminal Railroad Association of St. Louis,* 224 U.S. 383 (1912), firmly established the principle that the presence of a natural monopoly is no justification for excluding a competitor. See also *United States* v. *Griffith,* 334 U.S. 100 (1948); *International Salt Co.* v. *United States,* 332 U.S. 392 (1947); *Union Leader Corp.* v. *Newspapers of New England, Inc.,* 180 F. Supp. 125 (D. Mass. 1959), *aff'd in part and rev'd in part,* 284 F. 2d 582 (1st Cir. 1960), *cert. denied,* 365 U.S. 833 (1961).

In the words of Judge Learned Hand in the *Alcoa* case:

> "Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them." *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 427 (2d Cir. 1945)

Finally, the district court's decision does not deprive the Federal Power Commission of jurisdiction in this matter. Sections 205 and 206 of the Federal Power Act provide for the continuing supervision of rates, terms and conditions by the Commission and any necessary adjustments thereof. The Commission itself can, on its own motion, or on the complaint of a party, insure that Otter Tail is properly compensated for any service it renders.

CONCLUSION

WHEREFORE, amicus curiae urge that the judgment of the United States District Court be affirmed.

Respectfully submitted,

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October, 1972

APPENDIX A

No. 71-991

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

(Title Omitted in Printing)

CONSENT TO FILING OF BRIEF AMICUS CURIAE

As requested in your letter of August 16, 1972, I consent to the filing in the above case of a brief *amicus curiae* by the Missouri Basin Municipal Power Agency.

Dated this 18th day of August, 1972.

/s/ ERWIN N. GRISWOLD
Solicitor General of the United States

No. 71-991

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

(Title Omitted in Printing)

CONSENT TO FILING OF BRIEF AMICUS CURIAE

Your request for our permission to file a brief amicus curiae on behalf of Missouri Basin Municipal Power Agency is granted. This is in response to your letter of August 16, 1972.

Dated this 28th day of August, 1972.

FIELD, ARVESEN, DONOHO, LUNDEEN AND HOFF
By /s/ CYRUS A. FIELD
One of the Attorneys for Otter Tail Power Company